Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1998

HONORABLE BRUCE W. DODDS,

Petitioner,

vs.

AMERICAN BROADCASTING COMPANY, INC., a Delaware Corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Must a sitting judge defamed by implication in a television news journal broadcast demonstrate the defendant's intent to convey the defamatory implication under a subjective standard applied by the Ninth Circuit, where the defamatory implication is inescapable and the result of conscious choices made by the defendant in combining the audio and visual elements of the program?

PARTIES TO THE PROCEEDING

The petitioner, the Honorable Bruce W. Dodds, was the plaintiff-appellant below. The respondent, American Broadcasting Company, Inc., was the defendant-appellee below. There are no other parties to this litigation.

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Petitioner, the Honorable Bruce William Dodds, respectfully requests that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, filed May 27, 1998, on which rehearing *en banc* was denied on July 9, 1998.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Dodds v. American Broadcasting Company, Inc.*, 143 F.3d 1053 (9th Cir. 1998), and appears in Appendix A. The district court in *Dodds v. American Broadcasting Company, Inc.*, Civ. No. 95-6694 SVW (JRx), issued two unpublished opinions: an Order Granting Defendant's Motion for Summary Judgment, which appears in Appendix B; and an Order denying in part and granting in part a motion to dismiss, which appears in Appendix C.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit ("Court of Appeals") was entered on May 27, 1998. The Court of Appeals denied a timely petition for rehearing and suggestion for rehearing *en banc* on July 9, 1998 (Appendix D).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

STATEMENT OF THE CASE

In October, 1994, on its weekly "PrimeTime Live" television news journal, respondent American Broadcasting Company, Inc. ("ABC") broadcast a purported investigation into judicial behavior that was "bizarre," "outrageous" and "downright scandalous;" and into judges who were "lawbreakers, sellouts and just plain crazy." Three judges were singled out for particular censure. One was petitioner, the Honorable Bruce W. Dodds, then a senior judge of the Santa Barbara County Superior Court.

Among other things, the segment implied that Judge Dodds was so devoid of rational thought that he used a crystal ball to make judicial decisions.[1]

The first reference to the crystal ball was a litigant's comment that Judge Dodds "often use[d]" the crystal ball, "even in adoption cases." ABC knew, but did not state, that the speaker had never seen Judge Dodds use a crystal ball, and that her case was not an adoption case.

The bulk of the segment was devoted to another litigant's — Ms. Chris Johnson's — story of how Judge Dodds allegedly forced her to settle her and her son's case against the Catholic church. Ms. Johnson's son had been molested by a priest when he was eleven, and had attempted suicide. According to Ms. Johnson, after telling her son that the molestation "only happened twice" and "was no big deal," Judge Dodds pressured them into settling for only $60,000 when they "might have collected millions." Sympathetically referring to the conference as Ms. Johnson's "ordeal," ABC elicited her story of how Judge

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1. In fact, Judge Dodds has a toy crystal ball, given to him as a gift, which he uses for levity, only. It is not taken into the courtroom and it is not used to decide any matters whatsoever.

Dodds "used" a crystal ball to confirm his assessment of what her case was worth.[2]

What ABC did not say — expressly "chose" not to tell the viewers — were the following facts: Johnson's son was almost 18 years of age at the time of the conference, not eleven; Johnson was highly religious, and considered the toy crystal ball an "evil" manifestation of the "occult;" Johnson had also accused the judge of threatening her life and conspiring with the Catholic church; ABC had not confirmed the story with Johnson's son or any attorney at the conference;[3] and, while ABC knew that the conference was not binding, it also knew that it did not make that fact clear to the audience.

ABC further stated that "lawyers, litigants and his former clerk all say Dodds often used the crystal ball to support his decisions." This statement was accompanied by a visual shot of Judge Dodds on the bench, although ABC knew that no witness had ever suggested that Judge Dodds used the toy crystal ball in making judicial decisions.

ABC also showed film of its reporter following Judge Dodds and asking questions about the crystal ball, to which Judge Dodds did not respond: "Judge, is it true that you have a crystal ball? Judge couldn't you at least answer any questions at all? You are a public official, Your Honor. You have no comments?" ABC did not mention that it knew that Judge Dodds was precluded from commenting at the time, but set up the questioning sequence for filming anyway.

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2. Judge Dodds denied Ms. Johnson's story of what happened at the conference.

3. The appellate court mistakenly believed that ABC had consulted with attorneys present at the conference; in fact, the evidence was to the contrary.

Judge Dodds demanded a retraction, which ABC denied. After becoming aware of the retraction demand, ABC did not ensure the integrity of its files. Although he was aware of the retraction demand, the producer of the show destroyed his notes on the program.

Judge Dodds filed this suit based on both direct and implied defamatory statements. The trial court eliminated all but three of the alleged defamatory statements on a motion to dismiss. On ABC's subsequent motion for summary judgment, petitioner abandoned his claims of defamation as to all but the statements related to the crystal ball. The trial court found that petitioner had failed to present sufficient evidence of actual malice as to those statements, and granted summary judgment.

On appeal, the Ninth Circuit held that Judge Dodds had to satisfy a two-pronged test to prevail on his implied defamation claim as to the crystal ball. First, he had to show that the words were reasonably capable of sustaining the alleged implied meaning. As to this prong, the appellate court found that "a reasonable juror could find that ABC was stating by implication that Judge Dodds in fact decided issues by consulting the crystal ball." *Dodds v. American Broadcasting Company, Inc.*, 145 F.3d 1053, 1064 (9th Cir. 1998) (App. A, at 22a.) It based this finding on four factors: (1) that references to the crystal ball did not specify that the judge only used the ball to support his decisions; (2) that ABC accompanied a spoken reference to the crystal ball with a visual image of the judge on the bench where, presumably, he was deciding cases; (3) that the context of the piece, *i.e.*, the focus on "outrageous" behavior, supported such an implication; and (4) that the reporter opened the segment by referring to the accusation that Judge Dodds justified his decisions [by using the ball]. *Id.* at 21a-22a.

Second, the Court applied the Ninth Circuit rule established in *Newton v. National Broadcasting Co., Inc.*, 930 F.2d 662,

681 (9th Cir. 1990), *cert. denied,* 502 U.S. 866 (1991). Under *Newton*, petitioner had to show that a jury could reasonably find by clear and convincing evidence that ABC intended to convey the defamatory impression. As to this prong, the appellate court considered only one piece of evidence: the fact that ABC originally slated petitioner in a category entitled "how judges decide." *Id.* at 22a. However, the Court of Appeals reasoned that, since the final show did not contain an actual category titled "how judges decide," a reasonable juror could not find an intention to make the defamatory implication.

The appellate court also found that the segment itself did not contain any language demonstrating that ABC endorsed the defamatory implication. The court concluded that there was "no evidence" that the show's producers intended to convey the impression that petitioner used the crystal ball to make his decisions. *Id.* at 22a-24a.

In concluding that there was "no evidence" of intent, the Court of Appeal inexplicably ignored all of the evidence which had led it to conclude that the defamatory impression arose in the first place: *i.e.*, the context of the piece; the conscious choice to place a visual shot of the petitioner on the bench with a statement referring to the crystal ball; and the open-ended references to the crystal ball.

The appellate court likewise ignored the fact that, because ABC had originally categorized Judge Dodds as showing "how judges decide," a jury could easily — and reasonably — infer that ABC had pre-committed itself to building a show which indeed used Judge Dodds to show how judges decided, and that ABC had set up footage to support the implication that Judge Dodds decided cases by consulting a crystal ball. The court also ignored additional circumstantial evidence of intent to defame, including, *inter alia*, the facts that the producer

destroyed his notes on the program after he knew that Judge Dodds had demanded a retraction (and ABC permitted the destruction), and that ABC acknowledged that it intended certain loaded words to apply to Judge Dodds.

Finally, the Ninth Circuit refused to reconsider *Newton*'s requirement that intent to make the defamatory implication be determined under a subjective test as opposed to an objective test, *i.e.*, liability based on the "reasonable viewer's" perception. The appellate court reasoned that an objective standard would improperly allow a finding of actual malice where a journalist was merely negligent in misleading the public. The court noted that other Circuits employed a "similar actual intent requirement" in cases involving defamation by implication. *Id.*, citing *Chapin v. Knight-Ridder*, 993 F.2d 1087, 1093 (4th Cir. 1993) and *White v. Fraternal Order of Police*, 909 F.2d 512, 520 (D.C. Cir. 1990).

Having concluded as it did, the appellate court affirmed the trial court's granting of summary judgment. Petitioner's request for rehearing and suggestion for rehearing en banc were thereafter denied. This petition followed.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW ON WHICH THE CIRCUITS DIFFER AND WHICH MUST BE SETTLED BY THIS COURT.

The Ninth Circuit now requires a public figure plaintiff to demonstrate the defendant's subjective intent to defame, as part of the actual malice test. *Newton*, *supra* 930 F.2d at 680-681;

Eastwood v. National Enquirer, Inc., 123 F.3d 1249, 1256 and n.20 (9th Cir. 1997); this case, *Dodds*, 145 F.3d at 1604. Under this test, the fact that the implication is "clear and unescapable" is not evidence of actual malice. *Newton*, *supra*, 930 F.2d at 680.[4]

In this case, the Ninth Circuit test has immunized a network defendant who broadcast what any reasonable juror would consider a hit piece on a sitting judge. It attacked Judge Dodds with a defamatory implication truly horrifying to the public, *i.e.*, that a judge, the theoretical bastion of reason and justice, decided sensitive matters such as adoption and molestation cases by consulting a crystal ball.[5]

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4. Even if there were no conflict among the Circuits, this Court could grant this petition. The *Newton* subjective test must be scrutinized as a matter of constitutional interpretation, because it generates apparently inconsistent results. Compare, *Newton* (the fact that the defamatory implication was inescapable, and evidence of the producer's deliberate choices which led to that implication, did not establish intent, 930 F.2d at 680, 685); *Eastwood* (specific editorial choices demonstrated the intent to convey the defamatory implication, 123 F.3d at 1256); and *Dodds* (choice of audio/visual combinations, context of segment, and evidence of a pre-commitment to showing petitioner as "deciding" cases with a crystal ball were "no evidence" of intent to convey defamatory statement, 145 F.3d at 1064). These inconsistent results and analyses would be obviated by the application of an objective test. An objective test would take into account the reality of television, *i.e.*, the conscious, intentional joining of video and audio to reach the audience, as well as the nature of defamatory implications. It would also foster responsible, rather than undisciplined, journalism, without unduly chilling the exercise of First Amendment rights.

5. The Ninth Circuit has not been protective of jurists as a general rule. *See, e.g.*, *Standing Committee v. Yagman*, 55 F.3d 1430 (9th Cir. 1995), finding that the statements that the judge had a penchant for sanctioning Jewish lawyers, that the judge was dishonest, and that the judge was drunk on the bench, did not justify sanctions.

The Seventh Circuit also requires a showing of intent as part of the actual malice determination, but its test differs from that of the Ninth Circuit in critical respects. First, it permits a finding of intent if the statement could reasonably have only the defamatory meaning ascribed to it. *Woods v. Evansville Press Company, Inc.*, 791 F.2d 480, 488 (7th Cir. 1986). Second, it also permits a finding of intent if there is evidence to show that the publisher was aware that the reader could reasonably interpret the statement to contain the defamatory implication. *Id.* at 487; *see also Saenz v. Playboy Enterprises, Inc.*, 841 F.2d 1309, 1318 (7th Cir. 1988) (plaintiff can establish that the defendant was reckless toward the implications). This formulation of the rule thus suggests an objective standard, squarely conflicting with the Ninth Circuit rule.

Additionally, although the Fourth and District of Columbia Circuits require evidence that the defendant intends or endorses the defamatory implication, their intent determinations are *not* part of the actual malice test. Instead, these Circuits require the showing of intent to establish that the language is susceptible of bearing the defamatory meaning. *Chapin*, *supra*, 993 F.2d at 1092-93; *White*, *supra*, 909 F.2d at 520.

To the extent that the Fourth and District of Columbia Circuits consider the issue as bearing on whether the meaning is defamatory, the constitutional malice test is not implicated. *See Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 522 (1991) (whether the quotation was defamatory was an issue of state law, not First Amendment law). Because the issue is not constitutional malice, then the intent test of the Fourth and District of Columbia Circuits conflicts with the tests of the Ninth and Seventh Circuits.

The issue of intent in defamation by implication cases is of critical importance at this juncture. This is the electronic

age. Television production is highly sophisticated, including the production of "news." Networks vie for audience share as they fashion slick "news journals" with a far from neutral slant. Sound bites and visual cues are linked together and gone within seconds, leaving the viewer/listener with only a powerful sensory impression. That fast "take" cannot be diminished by reviewing, or by additionally scrutinizing, the report, as the viewer can do with the printed page.

The possibilities of electronic media were unimaginable only a few decades ago, when this Court decided *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964). Also unimaginable was the ease with which this media form could abuse the First Amendment protections carefully carved out for the press by judicial interpretation. In particular, it was impossible to conceive of the post-computer age media journalist's potential for implied defamatory statements.

Defamation by implication has always raised unique problems for courts attempting to strike a proper constitutional balance between free speech and the individual's right to be secure in good name and reputation. As one court explained:

> An implication or impression . . . is a 'created' statement flowing from the positioning of explicit statements. While it may or may not have been conceived in the head of the author, it is nevertheless born when the page is printed. Logic fails when one defamed by such a "created" statement is required to show knowledge of or reckless disregard for its falsity, when in fact it can rarely be proven that the author even knew of the implication.
>
> As a result, the actual malice standard, as now applied, rewards a publisher or reporter for

> communicating a statement in a surreptitious and invidious manner by implication. This is especially repugnant where, as here, the implication creates an appearance of fact rather than of mere opinion. Such result defeats the very purpose of the recent protections afforded to media expression concerning public figures — free flow of information vital to responsible decision-making in a democratic society.

Cochran v. Indianapolis Newspapers, Inc., 175 Ind. App. 548, 563, 372 N.E. 2d 1211, 1222 (Ind. App. 1978). *See also Saenz v. Playboy Enterprises, Inc.*, 841 F.2d 1309, 1314 (7th Cir. 1988) (rejecting requirement that defamatory statements specifically libel the plaintiff, stating: "A legal fiction denying the existence of clearly discernable, though not explicit charges, exposes public officials to baseless accusations and public mistrust while promoting an undisciplined brand of journalism both unproductive to society and, as we see it, unprotected by constitutional considerations.").

Striking the proper balance became additionally complicated with the advent of the electronic, computer-media age. Implications easily arise from a televised voice-over referring to one subject, connected with "flash" shots of emotive power, such as a shot of a judge being led away in handcuffs, or a shot of a judge ruling from the bench. A television broadcast can create a defamatory impression simply by joining a true statement with a skeptical tone of voice or a contradictory visual image. And the problem of defamatory implication is particularly acute when the broadcast is ostensibly a news broadcast:

> Unlike hyperbole or satire, the publication of implied defamatory statements against the

> background of apparently objective and neutral reporting is almost certain to be understood as factual. Moreover, the implied defamatory facts in this context may be given even more credence by the listener where, as here, the reports profess to be objective, yet subtly imply that the publisher tends to believe the sources alleging the defamatory facts.

Weller v. American Broadcasting Companies, Inc., 232 Cal. App. 3d 991, 1004; 283 Cal. Rptr. 644 (Cal. Ct. App. 1991) (finding defamatory implication reasonable). *See also Southern Air Transport, Inc. v. American Broadcasting Companies, Inc.*, 877 F.2d 1010, 1015 (D.C. Cir. 1989) ("the television medium offers the publisher the opportunity, through visual presentation, to emphasize certain segments in ways that cannot be ascertained from a mere reading of the transcript." (internal quotation marks omitted); *Lasky v. American Broadcasting Companies, Inc.*, 631 F. Supp. 962, 970 (S.D. N.Y. 1986) (juxtaposition of the varying segments into audio and video mosaic conveys the meaning or meanings intended).

Most critically important, with respect to any question of intent, the television broadcast involves a conscious mixture of more than one multi-dimensional element. This means that the television defendant, even more than the news print defendant, must deliberately choose and match the components of the published material, based on his or her professional understanding of how the mixture will be understood by the reasonable viewer.

It is time for this Court, as a matter of first impression, to reassess the duty of the electronic media as it exercises its phenomenal powers. With the exercise of rights should come accompanying duties. At the very least, a broadcast defendant should be held accountable for what it actually does: *i.e.*, it

carefully and intentionally considers the reasonable implications of its statements on the viewers, before publishing. And, where the defamatory implication it leaves is clear, the defendant should bear the burden of its patent insinuations: that clarity of implication should be considered evidence of the defendant's intent.

CONCLUSION

This petition should be granted because there is a clear conflict among the Circuits on the rule to apply in defamation by implication cases. Because the issue of intent is of great importance, and likely to recur, this Court should settle the conflict among the Circuits and establish whether the intent determination is constitutional; whether it forms part of the actual malice determination; and, if it does, whether it may be met by an objective standard.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION FOR THE UNITED STATES COURT OF APPEALS NINTH CIRCUIT DECIDED MAY 27, 1998

United States Court of Appeals,
Ninth Circuit.

No. 96-56300

Honorable Bruce W. **DODDS,**

Plaintiff-Appellant,

v.

AMERICAN BROADCASTING COMPANY, INC., a Delaware Corporation,

Defendant-Appellee.

Argued Oct. 9, 1997.

Decided May 27, 1998.

State court judge brought defamation action against broadcaster of program which included numerous comments on judge's performance. The United States District Court for the Central District of California, Stephen V. Wilson, J., granted summary judgment for broadcaster on three claims, and dismissed remaining claims. Judge appealed. The Court of Appeals, Reinhardt, Circuit Judge, held that: (1) neither statement that judge often used crystal ball to support his decisions nor implied statement that judge used crystal ball to make his decisions was defamatory; (2) implied statements that were subject of dismissed claims were not actionable; and (3)

expressions of opinion regarding public official's "fitness" for the position constitute protected speech.

Affirmed.

* * *

Steven M. Perry, Los Angeles, CA, for defendant-appellee.

Appeal from the United States District Court for the Central District of California Stephen V. Wilson, District Judge, Presiding

Before: REINHARDT and TASHIMA, Circuit Judges, and FITZGERALD, Senior District Judge.*

REINHARDT, Circuit Judge:

It has been said by supporters of the Honorable Bruce Dodds, a California state court judge, that he is "tough," "short," "abrupt," "direct," "rude," "impatient," and "gruff." Dodds v. Commission on Judicial Performance, 12 Cal.4th 163, 48 Cal.Rptr.2d 106, 906 P.2d 1260, 1265 (1995). It has been said by others less sympathetic to his cause that he uses a crystal ball in deciding cases and that he is "anything but a respectable superior court judge." Perhaps understandably, the latter remarks, broadcast nationwide on a news magazine program by the American Broadcasting Company ("ABC"), were the source of considerable consternation to Judge Dodds. In an effort to clear his name and unsully his reputation, he brought a defamation action against ABC, alleging that the network

* The Honorable James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

acted with actual malice in broadcasting numerous comments regarding his performance as a judge. He asserted that ABC's broadcast portrayed him as a criminal and as someone who is unfit for judicial service. We consider in this appeal whether the district court properly granted summary judgment in favor of ABC as to the crystal ball comment and whether it properly dismissed the remainder of the claims Judge Dodds now appeals.

BACKGROUND

While Judge Bruce Dodds was being investigated by the California Commission on Judicial Performance ("the Commission") on allegations of judicial misconduct, the ABC news magazine program "Prime Time Live" profiled him and two other judges in a segment entitled "Who's Judging the Judges." The program was broadcast on television stations across the country in October 1994. According to one of the show's producers, the purpose of the segment was to examine critically the disciplinary processes for judges who have been accused of misconduct, using three individual judges as examples. Although it purported to focus on the disciplinary process, much of the segment was devoted to detailing the misconduct itself.

The basic format of this type of show is familiar to most TV viewers: a news reporter interviews various people about a certain topic, and then combines clips of interviews and narration in order to construct a newsworthy report. Usually there are several segments in each program. In the program at issue, ABC news anchor Diane Sawyer introduced the segment that gave rise to this case by explaining that fellow ABC news reporter Cynthia McFadden was going to report on "judges

whose conduct seems downright scandalous." Immediately following this introduction, the segment cut to clips of three individuals commenting on the behavior of unidentified judges; the first individual described a judge, shortly to be revealed as Judge Dodds, as "a court jester . . . anything but a respectable superior court judge," while the next two individuals explained that they had been victims of other judges' sexual misconduct. McFadden elaborated on the theme of the show: "Last year, 12,000 complaints were filed against state court judges, yet more than 85 percent of these complaints were dismissed with little or no investigation. . . . [W]e decided to take a closer look."

McFadden introduced Professor Geoffrey Hazard, a highly regarded expert in the area of legal ethics, explaining that the professor "says there's a troubling tension between having an independent judiciary and reviewing the judges' behavior." Professor Hazard then stated: "The problem of who judges the judges is, particularly in a democracy, perhaps as difficult a question as there can be." McFadden noted that many complaints against judges are frivolous, and that "[t]he trick is to identify the serious ones." The segment then featured stories on three different judges from different parts of the country.

The segment first told the story of a judge in Indiana who had been accused of sexually molesting juveniles and was awaiting trial on other criminal charges. In that report, a young man explained how he had met the judge when he was in court as a juvenile offender and how the judge had taken an interest in him. Approximately two years later, the youth said, the judge began demanding sex from him. McFadden reported that although the judge had also been accused of similar conduct with other young men who had been in the juvenile justice system, nothing happened until the youth featured on the

program helped police arrange a sting operation. She stated that at the time of the broadcast, the judge was facing trial on charges of solicitation of a prostitute and drug dealing.

Following this story, which concluded with shots of the judge being led off in handcuffs, the segment turned to Judge Dodds. McFadden introduced the story by asserting:

In the past four years, I've covered about 250 trials, most of them gavel to gavel. I've often been struck by the way that judges justify their decisions on thorny points, often with wisdom drawn from experience, or with a superior grasp of the law. But never the way a judge in California has been accused of.

This portion of the segment cut first to a newsclip of Dodds denying any wrongdoing. Then McFadden explained that "[f]or the past several years, a stream of complaints" had been lodged against Judge Dodds concerning his lack of "judicial temperament." The segment then featured clips of interviews with people who had dealt with Judge Dodds and reports by McFadden regarding the allegations of misconduct against the judge. McFadden stated, for example, that a former court clerk had declared in a sworn statement that Judge Dodds would read newspapers and magazines while he was on the bench, and that he had screamed and spit in court.

Two litigants who had appeared in Judge Dodds's courtroom also recounted their negative experiences. Cindy Hart, whose divorce case was heard by the judge, stated that he had acted disrespectfully towards her and that when she took the witness stand to testify, he had said: "All I have to do is look at her to see she has psychological problems."

The report then focused on another litigant, Christine Johnson, who had appeared in front of Judge Dodds during the preceding year. Johnson and her son had sued the Catholic church, alleging that a priest had sexually molested the son. She described how the judge belittled their claim during a settlement conference and how he told her that because there were only two incidents of sexual molestation, it was "no big deal, and juries don't like to hear about things that aren't very juicy." McFadden then explained how Judge Dodds had pressured Johnson into accepting a low settlement offer: According to Johnson, Judge Dodds kept a crystal ball on the conference table in his chambers, where the parties engaged in settlement negotiations. After telling her what he thought her case was worth, Judge Dodds pressed a button on the crystal ball. The crystal ball responded "yes," confirming Dodds' settlement figure, and the judge then said to Johnson "There it is. That's it. That's what you get." McFadden stated that "[l]awyers, litigants, and [Dodds's] former clerk all say Dodds often used the crystal ball to support his decisions."

McFadden unsuccessfully attempted to interview Judge Dodds about the allegations and the segment included footage of the judge refusing to talk with her. Following this clip, McFadden explained that Judge Dodds had refused the interview because "state law prevented him from talking about the case." She then stated that ABC personnel had actually seen the crystal ball on a table in Judge Dodds's chambers. In conclusion, McFadden noted that the commission investigating Judge Dodds, later referred to by Sawyer as "the secret commission," did not call as witnesses any of the women who had been interviewed by ABC.

Immediately following the report on Judge Dodds, the segment turned to a story on a South Carolina magistrate who had sexually molested litigants for years. All told, 20 women came forward

with complaints about the magistrate's abusive behavior. The magistrate was eventually arrested and charged with multiple counts of assault and battery and official misconduct. He pleaded no contest to all the charges, but was only sentenced to 400 hours of community service and a $500 fine, despite the fact that he could have been sentenced to a 35-year term of imprisonment and a fine of $35,000. One of his victims expressed her outrage at the punishment, quipping that "[t]he penalty for molesting an alligator in this state is higher than the penalty that [the magistrate] got for molesting a woman."

McFadden ended her part of the program with the following:

Experts say whether judges get away with abusing their public office depends on three factors — how vigorously complaints are investigated, whether secrecy is used to protect judges from serious charges and whether the political climate is such that judges are punished fairly.

Diane Sawyer then offered two final notes. With respect to the Dodds part of the story, she first stated that the judge denied all the allegations against him; second, she stated that the Commission would neither confirm nor deny that an investigation of Judge Dodds was underway.[1] Sawyer concluded

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1. The Commission eventually found that Judge Dodds had engaged in misconduct and recommended that he be censured publicly. Dodds, 48 Cal.Rptr.2d 106, 906 P.2d at 1260. As the California Supreme Court reported:

[t]he bases for the Commission's recommendation [were] (1) that [Dodds] obstructed a law enforcement investigation, (2) that [Dodds]

(Cont'd)

the segment by reporting that a number of civil actions had been instituted in South Carolina against the sexually abusive magistrate and that the FBI had commenced an investigation.

Immediately after the program aired, Judge Dodds sought a retraction from ABC. ABC refused and Dodds brought suit

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(Cont'd)

"has frequently given the appearance of rudeness and prejudgment in his handling of cases," and (3) that [Dodds] made an offensive remark in chambers about two lawyers who had appeared before him.

Id. 906 P.2d at 1263.

With respect to the obstruction of justice charge, which related to an incident in which Judge Dodds witnessed another judge letting the air out of a tire on a car parked in the other judge's parking space, the California Supreme Court determined that although Dodds's conduct was "unjudicial and prejudicial," it did not constitute wilful misconduct. Id. at 1269. With respect to the in-chambers offensive remark about two lawyers, the court dismissed the charge on the ground that the California Constitution precluded discipline for offenses occurring " 'more than 6 years prior to the commencement of the judge's current term.' " Id. at 1270 (quoting Cal. Const. art VI, § 18(c)). The California Supreme Court agreed, however, with the Commission's finding that Judge Dodds's "rudeness and prejudgment in the handling of cases, as exhibited on four occasions, constituted prejudicial conduct," id. at 1269, and that it brought "disrepute on the judicial office." Id. at 1270. The court then noted that "[t]he record in this case is replete with evidence that [Dodds] is a talented judge who is often sought for his ability to settle difficult cases." Id. at 1271. It then concluded by saying " '[t]he purpose of these proceedings is not to punish errant judges but to protect the judicial system and those subject to the awesome power that judges wield.' We conclude that public censure in this case would not further this purpose." Id. (citations omitted) (quoting Furey v. Commission on Judicial Performance, 43 Cal.3d 1297, 240 Cal.Rptr. 859, 743 P.2d 919 (1987)). It therefore vacated the punishment.

against the network for slander and intentional infliction of emotional distress. In his complaint, he alleged that approximately 13 direct or implied statements made during the broadcast were slanderous and false and that ABC had depicted him as a criminal and unfit for office. The complaint further alleged that ABC was negligent and reckless because it broadcast the statements without regard for their truth or falsehood. ABC moved to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6). After a hearing, the district court granted the motion in part and denied it in part, dismissing as not actionable ten of the allegedly defamatory statements. In doing so, the district court narrowed the statements Judge Dodds had complained of down to the following three: (1) the statement that Dodds uses a crystal ball to support his decisions; (2) the statement that he consistently reads newspapers and magazines while he is on the bench; and (3) the statement that he screamed, yelled, and spit in the courtroom.

Subsequently, after additional discovery and depositions, ABC moved for summary judgment on the claims regarding the three remaining statements. Judge Dodds opposed ABC's motion only with respect to the statement that he used a crystal ball, which as the district court explained, boiled down to an argument that ABC, "by stating that he uses a crystal ball to support his decisions . . . impl[ied] that he only makes decisions based on a crystal ball." Because the district court found that Dodds had failed to produce sufficient evidence to support a finding that ABC acted with actual malice, it granted ABC's motion for summary judgment.

Judge Dodds appeals the district court's grant of summary judgment as to the crystal ball claim, as well as the district court's dismissal of seven of the ten dismissed claims. He does

not challenge the grant of summary judgment as to the statements that he read the newspaper and magazines on the bench and that he screamed, yelled, and spit in the courtroom; nor does he appeal the dismissal of three of the claims the district court dismissed.

DISCUSSION

Judges provide an easy and attractive target for unwarranted verbal assaults by all kinds of people, some of whom are simply frustrated by life or desirous of shifting the blame for their own failures to others, and some of whom find it to their personal advantage for one reason or another to criticize the judiciary or the judicial system. Judges are assaulted verbally by litigants, lawyers, state and federal public officials, the media, and even their superiors on the bench. The attacks range from the political (such as attacks on "activist" judges) to the highly personal, see, e.g., Standing Committee v. Yagman, 55 F.3d 1430, 1433-35, 1434 n. 4 (9th Cir.1995), from the bizarre to the outrageous. Sprinkled among these assaults, however, are legitimate expressions of criticism that constitute an essential part of the examination of the workings of an important government institution — an institution that must remain fully open to public scrutiny.

Wise judges, even when wounded by unfair assaults, have learned that the best policy is ordinarily to dismiss the attacks as part of the baggage of their jobs. Abusive criticism simply goes with the territory. Often it is best not to dignify the assaults or to fall into the traps set by one's critics. See United States v. Flynt, 756 F.2d 1352 (9th Cir.1985). Thin-skinned judges sometimes make the problem worse by seeking retribution for the insults, instead of maintaining the dignity their office demands.

That is not to say that the bench is helpless or that the bar should not speak forcefully in defense of the bench when judges are unjustly maligned. Doing so is indeed an important part of the bar's responsibility. It is all too often the case, however, that when the judge himself enters the fray as an active combatant what was already an unfortunate episode tends to become an ugly and demeaning public spectacle. Id. Similarly, judges must remain conscious of the bar's right of free speech, which may involve expressions that are distasteful, if not reprehensible. See Yagman, 55 F.3d at 1444-45.

Nevertheless, judges, like all other persons, have rights and may choose to answer or litigate when they believe that they have been wronged. Among their options is the filing of an action for defamation, as Judge Dodds did here. However, as we have already indicated, along with the advantages of public office come some limitations on the rights enjoyed by the average citizen.

It is well established that the First Amendment provides broad protection for journalistic expression that is critical of the conduct of public officials, including judges. One protection is that because Dodds is a public figure, ABC's broadcast concerning his alleged judicial misconduct will expose the network to liability under state defamation laws only if ABC acted with "actual malice." See New York Times v. Sullivan, 376 U.S. 254, 280, 279-80, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). This high standard of proof shields journalists who expose misconduct by public officials from liability and thereby guards against the chilling effect that state defamation laws may have on the free flow of information with respect to matters of public concern. Id. at 279, 84 S.Ct. 710. Another important protection is that the media and the public are free to express their opinions

regarding the fitness or qualifications of public officials, including judges, to hold office, as long as in doing so they do not make statements of fact that are otherwise actionable. See Monitor Patriot Co. v. Roy, 401 U.S. 265, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971). The right to express such opinions lies at the heart of the democratic process, and it is, indeed, an oft-exercised form of free speech.

I. SUMMARY JUDGMENT

In order to survive ABC's motion for summary judgment, Dodds must establish that a reasonable jury could find by clear and convincing evidence that ABC published the challenged statements with knowledge of their falsity or with reckless disregard for their truth or falsity. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-56, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); see also Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 511, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991). With respect to "reckless disregard," Judge Dodds must demonstrate that a genuine issue of fact exists with respect to whether ABC subjectively doubted the veracity of the statements. Bose Corp. v. Consumers Union, 466 U.S. 485, 513, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984). Our assessment regarding whether summary judgment is proper is influenced by the burden of proof Dodds would bear at trial. Anderson, 477 U.S. at 254, 252-54, 106 S.Ct. 2505 ("When determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under New York Times.").

We agree with the district court that Judge Dodds did not meet his burden and that ABC was therefore entitled to summary

judgment. Dodds failed to establish that a jury could reasonably find by clear and convincing evidence that ABC acted with actual malice with respect to the statement that he often uses a crystal ball.

The Crystal Ball

Judge Dodds's opposition to the district court's award of summary judgment is based on his objection to ABC's assertion that he used a crystal ball in the decision-making process. Dodds maintains that two distinct defamatory statements arose from the broadcast: (1) that he often used the crystal ball to support his judicial decisions, and (2) that he regularly used the crystal ball to make his judicial decisions, either of which could form a basis for his defamation claim.[2]

The first direct reference to the crystal ball was uttered in the segment's introduction by Cindy Hart, an interviewee who had been a litigant in Judge Dodds's courtroom. Hart declared that "[h]e uses a crystal ball often, even in adoption cases." Although Judge Dodds was not specifically identified as such, he was clearly the subject of Hart's statement. The second direct statement was made during Judge Dodds's part of the segment by another former litigant, Christine Johnson, who told ABC during an interview that the judge "had a crystal ball on the settlement conference table where he asked us to sit." Johnson, who was suing the Catholic Church on behalf of her son, then described her experience with Judge Dodds and his use of the crystal ball to support the settlement figure he proposed. Finally, in a third direct statement about the crystal ball, McFadden

2. For purposes of this opinion, we assume that the statements would be defamatory under California state law, that is that they are demonstrably false and that they caused damage to Dodds's reputation.

asserted: "Lawyers, litigants and his former clerk all say Dodds often used the crystal ball to support his decisions." There was, of course, also the indirect reference in McFadden's introduction of the part of the segment relating to Judge Dodds.

Judge Dodds challenges McFadden's direct statement that he often used the crystal ball to support his decisions, as well as the statement he argues is implied in the direct statement of Hart that he regularly used the crystal ball to make his decisions.[3]

As we noted above, Judge Dodds could prevail by showing either that ABC knowingly published false statements or that ABC acted with reckless disregard for the truth — that is, by showing that ABC had " 'obvious reasons to doubt the veracity' of its reporting, but engaged in 'purposeful avoidance of the truth.' " Eastwood v. National Enquirer, Inc., 123 F.3d 1249 (9th Cir.1997) (quoting St. Amant v. Thompson, 390 U.S. 727, 732, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), and Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989)). We are guided in our analysis by the Supreme Court's reasoning in Harte-Hanks, which elaborated on the high standard of proof required to show that a defendant acted with reckless disregard.

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3. If the only crystal-ball related statement at issue in this case were Johnson's, Dodds's admission during his deposition that he recalled using the ball during her settlement conference (but only for levity) would be dispositive of this claim because he would have failed to establish the falsity of the statement. However, Dodds alleges that ABC's broadcast of the other material effectively implied that he often used the crystal ball, an assertion he denies. We believe that a reasonable juror could conclude that the statements carry the implication that Dodds regularly used a crystal ball to support his decisions.

> A "reckless disregard" for the truth . . . requires more than a departure from reasonably prudent conduct. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. The standard is a subjective one--there must be sufficient evidence to permit the conclusion that the defendant actually had a high degree of awareness of probable falsity. As a result, failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard. In a case such as this involving the reporting of a third party's allegations, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

Id. at 688, 109 S.Ct. 2678 (internal quotations and citations omitted) (emphasis added).

In light of this standard, we discuss Judge Dodds's claim with respect both to the direct statement that he uses the crystal ball to support his decision and the implied statement that he uses the crystal ball to make his decisions, beginning with the former.

A.

In support of his claim based on McFadden's assertion that he often used a crystal ball to support his decisions, Judge Dodds contends that there was sufficient evidence from which a reasonable juror could find that ABC had actual knowledge as to the falsity of this statement. He relies principally on a

common-sense argument: ABC was aware that the crystal ball was a toy and "this fact plainly suggested that the crystal ball toy would not be used as support for any judicial decision," particularly in view of the fact that the ball responded in the negative half of the time. Judge Dodds also points out that McFadden admitted in her deposition that she thought it possible that he was using the crystal ball for "levity." In essence, he argues that no one could honestly believe that a sitting judge would use a toy in the context of serious judicial proceedings.[4] He concludes by saying that ABC must have known that he did not use the crystal ball to support his decisions and consequently must have known that its statement to that effect was false.

For several reasons, we are not persuaded by this argument. Significantly, we note that numerous sources informed ABC that they were personally aware of Judge Dodds's use of the crystal ball in the manner suggested by the litigants who actually appeared in the broadcast. These additional sources included other litigants, a former clerk, and attorneys who had dealings with Judge Dodds. In addition, although its methods of obtaining the information left something to be desired, ABC confirmed that a crystal ball sat on Judge Dodds's table in chambers; one of the show's producers took advantage of an open door to the chambers and forced his way inside where it sat in plain view. The fact that the crystal ball was obviously a toy is of little consequence. People, even judges, do peculiar things and engage in bizarre conduct. That, in fact, was precisely ABC's point about Judge Dodds. Moreover, it would have been just as (if not more) absurd and unbelievable if ABC's

4. We note that the persuasiveness of this argument is significantly undercut by Dodds's own admission during his deposition that he had in fact used the crystal ball during the settlement negotiations involving Johnson.

investigation indicated that Dodds had been using a "real" crystal ball to support his decisions.

Alternatively, Judge Dodds asserts that ABC's sources were unreliable and that its investigation was shoddy. From this evidence, he argues, a reasonable jury could conclude that ABC acted with reckless disregard for the truth. To prevail under this theory, Dodds must show that ABC had " 'obvious reasons to doubt the veracity' of its reporting," but deliberately avoided learning the truth. Eastwood, 123 F.3d at 1251 (quoting St. Amant, 390 U.S. at 732, 88 S.Ct. 1323). Toward this end, he contends that in addition to the fact that the crystal ball was a toy, there were other obvious reasons for ABC to question the truth of its reporting. In particular, he asserts that ABC's sources were patently unreliable, in spite of which the network failed to conduct a more extensive investigation.

With respect to ABC's sources, Judge Dodds first contends that Christine Johnson was not trustworthy. In particular, he maintains that ABC should have been suspicious of Johnson's statements on account of her deep religious convictions. However, although her religious beliefs may have had some effect on her view toward the use of a crystal ball, toy or not, they were not an indication that she was in any way unreliable or that she did not truthfully report the details of the incident to ABC. In any event, even if the network had had cause to doubt her story, the fact that the information she provided to ABC was consistent with the information ABC obtained from its other sources would have been sufficient to dispel whatever doubts might have existed. ABC additionally contacted the attorneys who had represented Johnson in her lawsuit to confirm with them her recollection of the settlement conference. Furthermore, ABC knew that Johnson had made identical

allegations regarding the crystal ball in a letter of complaint that she had submitted to the California Commission on Judicial Performance immediately after the incident.

Judge Dodds also challenges the trustworthiness of Cindy Hart, another former litigant, arguing that she was biased against him because she was unhappy with the results of her divorce. It is true that Hart was angry about how she had been treated in the course of her proceedings before Judge Dodds. It is also true that her statement that Judge Dodds used the crystal ball even in adoption cases was not based on first-hand knowledge, but was instead based on her own research into Dodds's judicial activities. ABC did not, however, simply rely on unverified statements made by a disgruntled litigant. Other sources confirmed the existence of the crystal ball and Hart's statements concerning Judge Dodd's use of the crystal ball in the context of adoption cases were corroborated by at least one other source, an adoption caseworker.

According to Judge Dodds, the former court clerk was also unreliable because in a sworn declaration regarding her observations of Dodds's courtroom behavior, she omitted any mention of the crystal ball. Dodds maintains that "one would expect her to allege Judge Dodds' most serious judicial defects [but she] said nothing about a crystal ball." Yet considering the context in which she made the declaration — it was apparently submitted in connection with Cindy Hart's ongoing divorce litigation, as evidence of Dodds's ill temper--it does not seem all that unusual that the former clerk would leave the crystal ball stories out. The ABC producer who researched the report interviewed the former clerk in person and found her to be credible. Moreover, ABC had no reason to doubt that the clerk was telling the truth.

Judge Dodds nonetheless asserts that ABC failed to pursue other avenues of information, in reckless disregard of its obligations. For example, he faults McFadden for not contacting the local bar association or interviewing other judges. He also asserts that McFadden should have inquired into whether the crystal ball was real or a toy, arguing that if she had discovered it was a toy and that it did not always respond favorably, she would have learned that he did not actually use the ball to justify his decisions. In addition, McFadden admitted at her deposition that she was not as concerned about the underlying truth of the interviewees' statements as she was about how complaints against judges were processed.

Notwithstanding Judge Dodds's assertions to the contrary, we conclude that any failures or omissions in ABC's conduct with respect to the reliability of its sources fall far short of that required to establish that it acted with reckless disregard for the truth. In St. Amant, 390 U.S. at 732-33, 88 S.Ct. 1323, for example, the Supreme Court held that a journalist does not act with reckless disregard for the truth when he relies on a source whose trustworthiness is unknown, so long as the journalist makes at least some attempt to verify the source's story. Other than fairly vague and routine reasons to question their motives, however, ABC had no particular cause to doubt the veracity of the people whom it interviewed. There is nothing in the record to suggest that Johnson, Hart, and the former clerk were prone to exaggeration or lying or would deliberately engage in such conduct.

Wholly aside from the question of the crystal ball, Judge Dodds is correct that ABC could have done a more thorough and responsible job in general in determining the facts before presenting its report regarding him. That, however, is not the

test for determining whether the network acted with actual malice in the context of defamation of a public figure. Moreover, we note that ABC probably would have satisfied its burden even if it had initially had reasons to doubt the veracity of its informants. It did not engage in purposeful avoidance of the truth, but rather sought out the best possible source to refute the allegations, either by providing direct evidence or supplying the names of persons who could do so. That source was Judge Dodds. Dodds, however, refused to answer the investigator's questions or to furnish any information at all, as was his prerogative.

In sum, Judge Dodds has succeeded, at most, in raising a factual issue regarding whether ABC was negligent in failing to conduct a more rigorous investigation of its story in general and its sources in particular. Mere negligence, however, is insufficient to demonstrate actual malice. Masson, 501 U.S. at 510, 111 S.Ct. 2419. McFadden's admitted lack of concern regarding the truth of the statements would only satisfy the requirements of New York Times if she had a "high degree of awareness" that the statements were probably false. Harte-Hanks, 491 U.S. at 688, 109 S.Ct. 2678. Dodds failed to present any evidence that such was the case, and in any event, whatever McFadden's own lack of concern may have been, ABC satisfied any obligation it may have had by checking the information it received with a number of knowledgeable individuals and by providing Judge Dodds with the opportunity to refute the charges and supply any useful evidence he may have possessed, including the names of any favorable witnesses.[5]

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5. The parties have not briefed the question whether, as Dodds apparently contended, state law precludes judges from commenting on

(Cont'd)

Appendix A

B.

Having concluded that ABC did not act with reckless disregard in broadcasting the statements regarding Judge Dodds's use of the crystal ball to support his decisions, we next consider whether a factually incorrect (and defamatory) implication arose from these statements; namely that Judge Dodds used the crystal ball to make his decisions. If so, we must examine whether ABC can be held liable for such an implied statement. In order to prevail on his claim that ABC's direct statements impliedly defamed him by indirectly stating that he used the ball to make his decisions, Judge Dodds must show that the words ABC uttered were reasonably capable of sustaining that meaning. More important, he must show that a jury could reasonably find by clear and convincing evidence that ABC "intended to convey the defamatory impression." Newton v. National Broadcasting Co., Inc., 930 F.2d 662, 681 (9th Cir.1990).

As to the first requirement, it may well be that when the segment is viewed in its entirety, the implication Judge Dodds suggests can readily be drawn from the totality of the crystal-ball-related statements. The first reference to the crystal ball was Hart's general assertion that Judge Dodds "often uses" the crystal ball. Hart did not specify that the judge uses it only

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(Cont'd)
allegations of misconduct or even responding publicly to public charges when some or all of the allegations are being investigated by the Commission. Accordingly, we will not undertake to evaluate the correctness of this assertion. We note, however, that at the end of the segment Diane Sawyer stated that Judge Dodds had denied all of the allegations, and also that the segment contained a newsclip of his earlier denial of them.

to support his decisions. And, as Judge Dodds points out, the visual accompanying the third statement (McFadden's statement that "[l]awyers, litigants and his former clerk all say Dodds often used the crystal ball to support his decisions") showed Dodds on the bench where, presumably, he was deciding cases. Given the context of the piece, which focused on "outrageous judicial behavior," and given McFadden's assertion in her introduction of Judge Dodds's story that she had witnessed hundreds of trials and had "often been struck by the way that judges justify their decisions on thorny points . . . but never the way [Dodds] ha[d] been accused of," a reasonable juror could find that ABC was stating by implication that Judge Dodds in fact decided issues by consulting the crystal ball.

It is not enough, however, to show that this implication was reasonable. Judge Dodds must further establish that ABC intended to convey the defamatory implication — and he must do so with "convincing clarity." Newton, 930 F.2d at 682. His strongest argument in this respect is that during the production process, ABC had slated him in a category entitled "how judges decide." But this evidence is wholly undercut by the undisputed facts. The category was proposed, and the report on Judge Dodds initially slated for it, well before ABC began conducting its interviews about him; however, after ABC completed those interviews it decided not to use any such category in the finished program. We do not think a reasonable juror could find that ABC's initial contemplation of a plan that it subsequently abandoned supports a conclusion that it intended to make the defamatory implication in the show that it actually produced. There is, in short, simply no evidence that the show's producers intended in the actual broadcast to convey to viewers the impression that Judge Dodds used the crystal ball to make his decisions. Nor does the segment itself contain any language

demonstrating that ABC endorses any such defamatory implication.

Judge Dodds asks us to reconsider Newton 's requirement that the test is a subjective one — that the network must have actually intended to convey the defamatory impression — and urges us to adopt in its place an objective, "reasonable viewer" standard. Under such a standard, a media defendant would be liable so long as the ordinary viewer would have perceived the implication, irrespective of the defendant's actual intent to convey the defamatory statement.

Recently, however, we reaffirmed our rule that subjective or actual intent is required and that "there is no actual malice where journalists unknowingly mislead the public." Eastwood, 123 F.3d at 1256. Moreover, all the courts of appeal that have considered cases involving defamation by implication have imposed a similar actual intent requirement. See, e.g., Chapin v. Knight-Ridder, 993 F.2d 1087, 1093 (4th Cir.1993) ("The language must not only be reasonably read to impart the false innuendo, but it must also affirmatively suggest that the author intends or endorses the inference."); White v. Fraternal Order of Police, 909 F.2d 512, 520 (D.C.Cir.1990) ("[I]f the communication, by the particular manner or language in which the true facts are conveyed, supplies additional, affirmative evidence suggesting that the defendant intends or endorses the defamatory inference, the communication will be deemed capable of bearing that meaning.") (emphasis in original); see also Partington v. Bugliosi, 56 F.3d 1147, 1152 n. 9 (9th Cir.1995) (discussing Chapin and White). Furthermore, we continue to believe that the Newton test requiring a clear and convincing showing of subjective or actual intent strikes the proper balance between protecting victims of defamation and

protecting against the possible chilling effect that results from overly broad applications of our defamation laws.

II. DISMISSED CLAIMS

Judge Dodds also asserts that the district court erred in dismissing seven of his original 13 claims pursuant to Fed.R.Civ.P. 12(b)(6). The statements in question were not direct assertions of fact, but rather were, according to Dodds, implied either by a part of or the entirety of the show. The statements Judge Dodds contends ABC "made" were as follows:

> (1) his conduct was the same as that of an accused or convicted felon;
>
> (2) he is one of the three worst judges in the country;
>
> (3) he has participated in a secret cover-up of his improprieties;
>
> (4) he constantly pressures parties to settle cases for less than they are worth;
>
> (5) he is hiding from public view;
>
> (6) he is eluding discipline because serious allegations are not vigorously investigated, secrecy is used to protect him from serious charges, and the political climate protects him; and
>
> (7) he is "unfit" to serve as a judge.

ABC asserts that it never made the defamatory statements — in other words, that what it reported in the segment cannot

reasonably be understood to convey the alleged defamatory implications. Alternatively, it argues that even if the statements it made could reasonably be so understood, they are not actionable because they constitute opinions regarding Judge Dodds's performance as a judge rather than assertions of fact susceptible of being proven true or false.

In Milkovich v. Lorain Journal Co., 497 U.S. 1, 20, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990), the Supreme Court canvassed its cases concerning the relationship between the First Amendment and state defamation laws. While the Court refused to create a strict dichotomy between opinion and fact, as the defendants had urged, it recognized that there can be no liability for defamation if a defendant's direct statement " 'cannot reasonably be interpreted as stating actual facts' about an individual" that are provably false. Id. at 20, 110 S.Ct. 2695 (quoting Hustler Magazine v. Falwell, 485 U.S. 46, 50, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988)). Under Milkovich, therefore, Judge Dodds must show that a reasonable juror could conclude that the allegedly defamatory implications constituted provably false assertions of fact.

Accordingly, because Judge Dodds's claims are based on statements he alleges are implied in the broadcast, he faces three obstacles to establishing liability, in addition to having to show that the statements are defamatory. Two of the obstacles--establishing that a reasonable juror could find that the broadcast either directly or impliedly made the statements, and establishing that the statements are factual in nature and susceptible of being proved true or false — present insuperable problems for Dodds at the motion to dismiss stage. As we discussed above, the third obstacle — establishing actual malice — serves to defeat the crystal ball claim (as well as two others

not appealed) at the summary judgment stage. After carefully reviewing the claims that were dismissed, and are now appealed, we agree with the district court that the statements upon which they were based are not actionable, either because they are not implications the segment reasonably can be understood to convey or because they are not assertions of fact and thus cannot be proved to be false.

A. Dodds's conduct is the same as that of a felon.

ABC made no explicit statement asserting that Judge Dodds had engaged in conduct that was equivalent to the actions of a felon, but he contends that the network intended to convey this message. He relies principally on the fact that the segment sandwiched his story in between stories on two other judges each of whom was accused of serious felonious activities. In particular, he asserts that "the broadcast could have been seen by a reasonable viewer as saying that [he] was liable for conduct not even discussed" and that the broadcast "left the impression that [he] had committed undisclosed felonies." We disagree.

Judge Dodds relies on Weller v. American Broadcasting Companies, Inc., 232 Cal.App.3d 991, 283 Cal.Rptr. 644 (1991), in support of his contention that ABC implied that he had engaged in criminal activities. The broadcasts at issue in Weller, however, were of an entirely different character. The plaintiff in that case had been the subject of an investigation by the ABC affiliate station in San Francisco. Over the course of several weeks, the station broadcast numerous pieces regarding the plaintiff's role in an allegedly fraudulent sale of two antique candelabra to a local museum. In those broadcasts, the reporter linked the plaintiff to a convicted felon and clearly suggested that the plaintiff had played a role in the fraud.

Here, however, ABC made no suggestion that Judge Dodds was connected to any criminals or to any criminal activity. Although ABC's decision to include his story in the same segment with stories about two other judges whose actual or alleged conduct was criminal may well have been irresponsible, and unfair to Judge Dodds, we agree with the district court that the implication cannot reasonably be drawn that Judge Dodds was involved in any criminal activity.

B. Dodds is one of the three worst judges in the country.

Judge Dodds maintains that by focusing its story on him and two other judges, ABC intended to convey to its viewers that it had selected the three worst judges in the country to profile. While we think it could reasonably be inferred that Judge Dodds's conduct was among the most disturbing that ABC had uncovered, we do not believe it is a reasonable inference that the three judges featured in the segment were the three worst in the country. A reasonable viewer would not have understood that ABC, by selecting three judges to profile, was making a statement to that effect. Moreover, even if ABC had made such a statement, it would be in the nature of an opinion rather than the type of factual assertion that can be proved to be demonstrably false.

C. Dodds participated in a cover-up.

In the portion of the segment profiling Judge Dodds, ABC included shots of a closed door accompanied by McFadden's discussion of the Commission's investigation of the judge. McFadden stated that several people who had formally complained about Judge Dodds's behavior were not asked to

testify before the Commission. He argues that a reasonable implication of this is that he was participating in a cover-up of his activities. We do not believe that a reasonable factfinder could conclude that ABC's statements conveyed any such implication. Although the inference might reasonably be drawn that the Commission was acting in secrecy, perhaps improperly, there was no implication that Dodds himself was a participant in any cover-up. Therefore, the statement was not actionable.

D. Dodds pressures parties to settle cases for less than they are worth.

In connection with Christine Johnson's statements that Judge Dodds pressured her into settling her case against the Catholic Church for far less than what it was worth, Judge Dodds asserts that ABC implicitly stated that he "wrongfully and constantly pressures cases to settle for less than they are worth." Part of this statement — that he pressures parties to settle their cases — is not defamatory. In fact, Judge Dodds is sought after because of his settlement skills. See Dodds, 48 Cal.Rptr.2d 106, 906 P.2d at 1270. Exerting pressure on parties is part of the settlement process; or at least it is a technique used by many settlers. The allegation that Judge Dodds exerts this pressure wrongfully in order to get parties to settle for less than their cases are worth is not actionable. We agree with the district court that the term "wrongful" as used in this context is vague and not susceptible to proof as to its truth or falsity. The "worth" of cases and whether a judge tries to settle cases for less than their worth are largely subjective questions involving difficult and complex legal and practical judgments. Accordingly, that part of the allegation does not constitute an assertion of fact that can be proved false.

E. Dodds is hiding from public view.

Judge Dodds contends that ABC's statement that he refused to comment, coupled with the film clip of him walking away from McFadden as she attempted to interview him, conveys the implication that he was in hiding from the public. We do not think this factual assertion can reasonably be inferred from the segment. ABC stated that Judge Dodds was prohibited from talking to the media about the pending disciplinary proceedings, and there was no suggestion that his refusal to talk to ABC was the result of his hiding out. Moreover, presenting footage of a public official refusing to answer questions about scandalous charges does not constitute defamation of the official. To the contrary, it is simply a regular part of the nightly news these days.

F. Dodds is eluding discipline.

Judge Dodds asserts that the statement that he is eluding discipline, like the statement that he is participating in a cover up, was implied by means of the closed-door shots and the description of the disciplinary committee as being engaged in a secret investigation. We cannot agree, however, that the segment can reasonably be understood as conveying such an implication. ABC's message in this respect was rather that Judge Dodds may avoid being punished for his errant behavior not because of his own efforts to elude discipline, but because of a faulty disciplinary system. Accordingly, the statement is not actionable.

G. Dodds is unfit to serve as a judge.

ABC did not state that Judge Dodds was unfit to serve as a judge, but Judge Dodds contends that this is a reasonable

implication arising from statements that relate to his use of the crystal ball and statements that suggest that his conduct was equivalent to that of an accused or convicted felon. For at least two reasons we hold that the implied statement that Judge Dodds is unfit for judicial office is not actionable. First, according to Judge Dodds, the implication of unfitness arises from one set of comments and one alleged subsidiary implication, both of which we have already considered and disposed of in a manner that precludes him from prevailing on this claim. Given that we have held that the alleged implication that Judge Dodds's conduct was the same as a felon's did not arise and that the set of comments regarding the crystal ball was not made with actual malice, Dodds cannot convert these two nonactionable items into an implied actionable statement by asserting that they compel a defamatory conclusion.[6] As we have previously stated, an opinion based on an implication arising from disclosed facts is not actionable when the disclosed facts themselves are not actionable. See Partington, 56 F.3d at 1156 ("[W]hen a speaker outlines the factual basis for his conclusion, his statement is protected by the First Amendment."); see also Yagman, 55 F.3d at 1439 ("A statement of opinion based on fully disclosed facts can be punished only if the stated facts are themselves false and misleading."). Thus, even if ABC had ended its story on

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6. While the crystal ball claim was not determined to be nonactionable until summary judgment, the dismissal of the "unfitness" claim on a 12(b)(6) motion does not constitute reversible error. In the first place, because the other alleged basis for the implication of unfitness has been found not to support the meaning Dodds attaches to it, it is only the crystal ball claim that could give rise to the alleged defamatory implication. Thus even if the dismissal was premature, it was not prejudicial because we have held that the crystal ball claim is nonactionable. Moreover, the motion to dismiss was in any event properly granted for the second reason explained in the text infra.

Judge Dodds by explicitly stating that he was unfit for judicial office, a reasonable viewer would have understood that the network was expressing an opinion it had formed on the basis of the (nonactionable) information it had presented, and the opinion would be protected by the First Amendment.[7] See Partington, 56 F.3d at 1156; see also Yagman, 55 F.3d at 1439 ("When the facts underlying a statement of opinion are disclosed, readers will understand they are getting the author's interpretation of the facts presented."); Moldea, 22 F.3d at 317 (stating that an assertion, even if verifiable, is not actionable if it is "supported by revealed premises" that are not false). In the case of a public figure, the rule we have described is applicable not only where the underlying facts are not actionable because they are nondefamatory but also where they are not actionable because there is an absence of actual malice.

Second, and more important, we hold in the alternative that statements of opinion concerning whether a person who holds high public office is fit for that office or is competent to serve in that position are protected under the First Amendment, whether or not those statements are supportable, verifiable, or based on facts or premises that are disclosed. This is particularly true where the subject of the comments holds elective office (as does Judge Dodds) or is a candidate for such office, although the rule clearly applies equally to all state and federal judges, elected, appointed, or otherwise. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 345, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) (noting that "those classed as public figures have thrust

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7. Even were we to consider the other statements that Dodds does not raise on appeal, including the segment in its entirety, we would reach the same conclusion because none of the specific statements was independently actionable and the segment as a whole conveys a message that is too debatable and subjective to meet the Milkovich standard.

themselves to the forefront of particular public controversies . . . they invite attention and comment").

In Partington, we held that statements concerning an attorney's performance during a particular trial were protected by the First Amendment. While we expressly reserved the question "whether the First Amendment would protect more general statements regarding a lack of professional ability," 56 F.3d at 1152 n. 7, we hesitated only with respect to statements concerning the general competence of private individuals. See also id. at 1158 n. 16. However, a statement that someone who holds high public office, including judicial office, is unfit to serve in that position clearly reflects a subjective opinion regarding an important public policy matter and is part of the ongoing political debate that is protected by the First Amendment. Opinions as to whether an officeholder deserves or is qualified to hold his position are often expressed in hyperbolic and offensive terms. See Monitor Patriot, 401 U.S. at 275, 91 S.Ct. 621 (noting that political speech may include " 'exaggeration [and] vilification of men who have been, or are, prominent in church or state' ") (quoting Cantwell v. Connecticut, 310 U.S. 296, 310, 60 S.Ct. 900, 84 L.Ed. 1213 (1940)). Oftimes political statements are neither mature nor enlightening; sometimes they are even erroneous. Nevertheless, such statements constitute the type of speech that "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.' " New York Times, 376 U.S. at 279, 84 S.Ct. 710 (quoting N.A.A.C.P. v. Button, 371 U.S. 415, 433, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963)). Part of our American heritage is the right of all citizens to express their views about politicians, officeholders, and umpires, frequently in highly unfavorable terms. Indeed, were we to conclude otherwise, millions of citizens and hundreds of

political pundits would currently be committing libelous and slanderous acts on a daily basis.

In concluding that expressions of opinion regarding a public official's "fitness" for the position constitute protected speech, we note that our holding does not change the rule that subsidiary statements that contain false and defamatory factual assertions are actionable, if made with actual malice. Here, however, as we have explained, there are no such subsidiary statements that qualify. The district court properly dismissed the claim that is based on the "implication" that Judge Dodds is not fit for judicial service.

CONCLUSION

For the reasons stated above, we affirm the district court's order as to the dismissed claims that Judge Dodds appeals. We also affirm its order of summary judgment as to the one claim covered therein.

AFFIRMED.

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APPENDIX B — ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA FILED JULY 30, 1996

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 95-6694 SVW (JRx)

HON. BRUCE W. DODDS,

Plaintiff,

v.

AMERICAN BROADCASTING COMPANY, INC., a Delaware corporation,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. BACKGROUND

Plaintiff, the Honorable Bruce W. Dodds, is a judge of the Superior Court for the County of Santa Barbara. On October 6, 1994, defendant American Broadcasting Company, Inc. ("ABC") broadcast a television show called "PrimeTime Live." The show included a segment entitled "Who's Judging the Judges?" that depicted plaintiff and two other judges in an unflattering light. After the show aired, plaintiff demanded a retraction. Defendant failed to air the requested retraction, and plaintiff filed this action. Plaintiff's complaint pleads causes of action for slander per se and infliction of emotional distress, all based upon defendant's broadcast.

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Defendant filed a motion to dismiss. In an Order filed on December 22, 1995 ("December 22 Order") , the Court denied the motion, but struck many of plaintiff's allegations for failure to state a claim upon which relief could be granted. The only remaining allegations concerned plaintiff's alleged use of a crystal ball; screaming, yelling, and spitting; and reading newspapers and magazines while on the bench. A detailed description of the broadcast may be found in the December 22 Order.

Defendant filed a motion for summary judgment that was originally scheduled to be heard on July 1, 1996. In an Order filed on June 24, 1996, the Court continued such hearing until July 15, 1996 for docket-management reasons unrelated to the ex parte application for a continuance filed by plaintiff on June 20, 1996. Plaintiff sought a continuance of the motion pursuant to Fed. R. Civ. P. 56(f) in order to take additional discovery. The Court continued the hearing until July 29, 1996, and ordered that a new opposition and reply be filed to address such additional discovery. Defendant's motion came on for hearing on July 29, 1996. In his opposition to defendant's motion, plaintiff stated that he was dropping his allegations based on defendant's reporting of statements made by his former court clerk, Ellen Wall. At the July 29 hearing, plaintiff confirmed that of the three allegations remaining after the December 22 Order, he was pursuing only the allegation regarding the crystal ball.

The crystal ball issue relates to the allegations that defendant slandered plaintiff by *stating* that he uses a crystal ball to *support* his decisions and by *implying* that he "only *makes* decisions based on a crystal ball." Complaint at ¶9(c) (emphasis added).

Appendix B

The broadcast showed Cindy Hart, a litigant who had had a case before plaintiff, saying that plaintiff "uses a crystal ball often, even in adoption cases." Transcript at 1. Cynthia McFadden, an ABC reporter, later stated that "lawyers, litigants and his former clerk all say Dodds often used the crystal ball to support his decisions." *Id.* at 3. The following exchange involved Christine Johnson, another litigant: "He had a crystal ball on the settlement conference table where he asked us to sit. [McFadden:] Did he use this crystal ball? [Johnson:] Yes, he did. He said, 'This is what I think your case is worth,' and then he pressed a button on the crystal ball and it answered, 'Yes' and he said,: 'There it is. That's it. That's what you get." *Id.*

Although plaintiff has opposed the motion with evidence and legal argument, he also seeks another Rule 56(f) continuance, this time on the ground that he has not been permitted to depose Diane Sawyer, who anchored the segment.

The Court has carefully considered the parties' submissions and oral argument, and for the reasons that follow, grants defendant's motion.

II. DISCUSSION

ABC makes three arguments. (1) plaintiff has failed to present evidence from which a rational jury could find by clear and convincing evidence that ABC acted with actual malice; (2) most or all of the broadcast is privileged under Cal. Civ. Code 47(d) regardless of ABC's intent; and (3) plaintiff is collaterally estopped from disproving that the gist or sting of the show was substantially true by virtue of the California supreme court's opinion in his bar discipline case. The Court

agrees with the first argument, and disagrees with the second and third.

A. *Actual Malice*

Plaintiff concedes that he is a public figure. He therefore must prove that ABC acted with "actual malice" in broadcasting the crystal ball allegation. *E.g., Newton v. National Broadcasting Co., Inc.*, 930 F.2d 662, 668 (9th Cir. 1990). "Actual malice" doesn't mean ill will; it is a constitutional term of art. To meet this constitutional standard, plaintiff must prove that ABC either "realized that [its] statement was false or that [it] subjectively entertained serious doubt as to the truth of [its] statement." *Id.* (quoting *Bose Corp. v. Consumers Union of United States*, 104 S. Ct. 1949, 1965 n. 30 (1984)) (other citations omitted).

"Actual malice" is a subjective standard: "Even an extreme departure from accepted professional standards of journalism will not suffice to establish actual malice; nor will any other departure from reasonably prudent conduct, including the failure to investigate before publishing. Only the existence of 'sufficient evidence to permit the conclusion that the defendant actually had a high degree of awareness of . . . probable falsity' will suffice to meet the subjective test." *Id.* at 669 (*quoting Harte-Hanks Communications, Inc. v. Connaughton,* 109 S. Ct. 2678, 2696 (1989)) (other internal quotation omitted). The Supreme Court has made it "clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth or his publication. Publishing with such doubts shows reckless

disregard for truth or falsity and demonstrates actual malice." *St. Amant v. Thompson*, 88 S.Ct. 1323, 1325 (1968).

At this summary judgment stage, plaintiff "must show that the evidence in the record could support a reasonable jury finding by clear and convincing evidence that the allegedly defamatory statements were made with actual malice." *McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1301 (D.C. Cir. 1996) (citing Anderson v. Liberty Lobby. Inc., 106 S. Ct. 2505, 2513-14 (1986)). *See also Gertz v. Robert Welch, Inc.*, 94 S. Ct. 2997, 3008 (1974) (actual malice must be demonstrated by "clear and convincing proof"); *New York Times v. Sullivan*, 84 S. Ct. 710, 728-29 (1964) (proof must be with "convincing clarity"); *Newton*, 930 F.2d at 668 ("clear and convincing evidence"); *Hoods v. Evansville Press Co., Inc.*, 791 F.2d 480, 484 (7th Cir. 1986).

All of the people involved in creating the segment for ABC declare that they did not subjectively doubt the truth of the crystal ball allegation. Plaintiff has no evidence that any of the people involved with the show knew the crystal ball allegation to be false or subjectively entertained serious doubts as to its truth or falsity. Instead, he seeks refuge in a narrow window in this subjective test left open by the Supreme Court in dicta in *St. Amant*:

> The defendant in a defamation case brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the

> defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put then in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

88 S. Ct. at 1326. Plaintiff also relies on the Supreme Court's differentiation of "purposeful avoidance" of the truth from innocent ignorance of the falsity of a statement. *See Harte-Hanks*, 109 S. Ct. at 2691 ("inaction [which] was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [the] charges" will support a finding of actual malice).

Most of the *St. Amant* dictum is simply inapplicable. Dodds has no evidence that ABC "fabricated" anything, "imagined" anything, based anything on a single phone call or anonymous report, or ever deliberately decided not to pursue a particular line of inquiry because it didn't want to know the truth. And the allegation, while possibly somewhat "inherently improbable," was *not* published without any investigation or confirmation.

In his papers and at the July 29 hearing, plaintiff emphasized the additional investigation that ABC could and possibly should have conducted. But "actual malice" isn't a negligence standard, so the question is not whether ABC conducted a reasonable investigation, but whether ABC's investigation was so risible, and the allegations it reported so outrageous, as to render its conduct assimilable to publishing

"inherently improbable" allegations without any investigation, thus bringing its conduct within the narrow window of the *St. Amant* dictum.

ABC *did*, conduct some investigation; after it had talked to several people who confirmed that plaintiff had a crystal ball and used it in some manner, and after it had gone in and seen the crystal ball sitting in plaintiff's office, the allegation published by ABC was far from improbable.

And while there may have been some reason to doubt the veracity or accuracy of Hart and Johnson's accounts (they were disgruntled litigants and Johnson was very religious and thought crystal balls were "evil"), ABC didn't just rely on them blindly and exclusively. Plaintiff's argument in his papers that ABC didn't do any investigation is simply wrong. In fact, ABC spoke to at least two lawyers who confirmed that plaintiff used a crystal ball. Longhini Tr. 170-71; 205-06.[1] ABC spoke to the attorneys involved in Johnson's case. ABC spoke to plaintiff's former clerk, who said that plaintiff "did make use of the crystal ball" and that he "would say that he was right, and use this thing to demonstrate it." *Id.* at 206-07. ABC confirmed firsthand that plaintiff had a crystal ball on his desk. And ABC spoke to an adoption caseworker who confirmed that plaintiff had used the crystal ball in an adoption case. McFadden Tr. at 55-57; Longhini Tr. at 172.

Plaintiff has no evidence that any of ABC's employees are lying about any of these matters, and his mere hope that the jury will disbelieve them is insufficient to withstand summary

1. Plaintiff's opposition also states baldly that Johnson "was not a credible source since she made up the allegations about the crystal ball." Opp. at 4 n.8. There is *no* evidence that she "made up" her allegations.

judgment. *Newton*, 930 F.2d at 680 ("[t]he district court also erred in relying on the proposition that the jury could have based a finding of actual malice on a determination that the journalists' testimony about their state of mind was not credible," since the " 'discredit[ing] [of] testimony is not considered a sufficient basis for drawing a contrary conclusion' ") (*quoting Bose*, 104 S. Ct. at 1966).

The Court concludes that this is not a case where it would be appropriate to say that the sources relied upon were so untrustworthy, what they said was so improbable, and the investigation was so negligible, that ABC can be said, without any evidence, to have subjectively entertained serious doubts as to the truth of its statements. Nor is there any evidence that ABC "purposefully avoided" the truth. While the evidence could support a finding that ABC was not as concerned as a reasonable actor should have been with discovering the truth — in other words, that ABC should have done more investigation — there is nothing whatever in the record indicating that ABC ever took any action intentionally designed to avoid discovering the truth.

Another consideration relates to the supposed implied assertion that plaintiff "only *makes* decisions based on a crystal ball," Complaint at ¶9(c) (emphasis added), rather than using the crystal ball to support his decisions as the broadcast explicitly stated. Plaintiff does not dispute that it is his burden to present evidence from which a jury could find by clear and convincing evidence that ABC in fact "intended that the [broadcast] be read to contain the defamatory innuendos the plaintiff attributes to it." *Woods v. Evansville Press Co., Inc.*, 791 F.2d 480, 486-87 (7th Cir. 1986). To withstand summary judgment, plaintiff would thus have to present evidence from

which a jury could find both that ABC knew the inference to be false (or seriously doubted its truth) *and* that it intended the inference to arise.

In *Newton*, Wayne Newton argued that a show broadcast by NBC defamed him by implying that he had bought a Las Vegas hotel in Part with Mafia funds. NBC argued that it had not intended to imply any such thing. The district court was unpersuaded by NBC's argument, holding that NBC "should have foreseen" that that inference would arise and that it was "clear and inescapable." The Ninth Circuit reversed. It held that the foreseeability of the inference was irrelevant under the subjective actual malice test, and that the fact (if it was a fact) that the inference could be drawn from the show did not establish that NBC acted with actual malice in broadcasting the show because relying on that "substituted [the court's] own view as to the supposed impression left by the broadcast for that of the journalists who prepared the broadcast." 930 F.2d at 681. The Court rejected in unequivocal terms the argument relied upon by the district court and urged by plaintiff in this case:

> [S]ince the implication it took from the broadcast was 'clear and inescapable' to the court, it concluded that the jury could properly find that NBC and its journalists intended to leave that impression. Such an approach eviscerates the First Amendment protections established by *New York Times*. It would permit liability to be imposed not only for what was not said but also for what was not intended to be said.

Id.

ABC's witnesses testified that they did not intend to imply that plaintiff used the crystal ball to make decisions. Plaintiff has no contrary evidence. (One ambiguous reference in preliminary notes written before any of the interviews for the broadcast were even conducted is insufficient to defeat summary Judgment. Those notes put "Judge Dodds/crystal ball" under the heading "How Judges Decide" in a rough sketch of possible angles for a show on judges.) Plaintiff's argument that this implication is plain from Hart's statement during the broadcast is, first, the same argument the Ninth Circuit rejected so categorically in *Newton* and, second, wrong on the facts. Saying someone "used" a crystal ball doesn't say anything about how he used it. The word is broad enough to cover using it purely for levity during heated settlement conferences (a practice to which plaintiff admits), using it as the sole means of decisionmaking, or anywhere in between. Given the Ninth Circuit's holding in *Newton*, it cannot be said that ABC's broadcast made the statement that plaintiff "only makes decisions based on a crystal ball."

The Court thus holds that plaintiff has failed to meet his burden of producing evidence from which a jury could find by clear and convincing evidence that defendant acted with actual malice in broadcasting the crystal ball allegation. Defendant is therefore entitled to summary judgment on all of plaintiff's claims. *See Hustler Magazine v. Falwell*, 108 S. Ct. 876 (1988) (constitutional protection embodied in actual malice rule extends to claims for infliction of emotional distress as well as for slander and defamation).

B. *Civ. Code § 47(d)*

ABC also relies on Cal. Civ. Code § 47(d), which provides an absolute privilege for a "fair and true report" of a "judicial

proceeding." This privilege extends to out-of-court statements about what happened in court, not just in-court statements. *Dorsey v. National Enquirer, Inc.*, 973 F.2d 1431, 1437 (9th Cir. 1992). It is not affected by malice or any other mental state. *McClatchy Newspapers, Inc. v. Superior Court*, 234 Cal. Rptr. 702, 710 (Cal. App. 5 Dist. 1987). A report is "fair and true" if its "gist or sting" is accurate, even if some of its details are not. *Dorsey*, 973 F.2d at 1436. "Judicial proceeding" is also defined broadly. *See id.* at 1434-35.

ABC argues that Johnson's statements, reported by ABC, concerned matters occurring in a judicial proceeding and is privileged as a "history of the proceeding." *Id.* at 1437. But since what occurred during the settlement conference involving Johnson is in dispute (she says plaintiff used the crystal ball, plaintiff can't remember using it and denies that he would have said what Johnson says he said), the Court cannot determine as a matter of law that the "report" was "fair and true." The California cases make it clear that this issue may be decided by the court only where there is no genuine dispute about what occurred during the judicial proceeding. *Id.* at 1435 ("The 'fair and true' issue is one of law when there is no dispute as to what occurred in the judicial proceeding reported upon or as to what was contained in the report' ") (quoting *McClatchy*, 234 Cal. Rptr. at 711) (other citations omitted) Here there is such a dispute. The Court therefore rejects ABC's argument that summary judgment is required by Civ. Code § 47(d).

C. *Collateral Estoppel*

The California supreme court recently issued its decision reviewing the findings and conclusions of the Commission on Judicial Performance, which had conducted an investigation

plaintiff. *Dodds v. Comm'n on Judicial Performance*, 48 Cal.Rptr.2d 106 (Cal. 1995). The Commission conducted hearings and concluded, inter alia, that clear and convincing evidence showed that plaintiff had "frequently given the appearance of rudeness and prejudgment in his handling of cases." *Id.* at 109. The supreme court agreed with this finding of fact (it rejected the Commission's conclusion of law that plaintiff be publicly censured). The principal issue in the proceeding before the supreme court was plaintiff's alleged obstruction of justice arising out of an incident in which he observed one of his fellow judges letting the air out of a tire of a car parked in the other judge's space. Neither the Commission nor the supreme court addressed plaintiff's use of a crystal ball.

The gist or sting of the obstruction of justice finding has nothing to do with the crystal ball allegation at issue here. Nor was the crystal ball, or anything like it, mentioned in the part of the Commission's conclusions regarding plaintiff's rudeness and prejudgment.[2] The gist of the Commission's findings, and of the supreme court's opinion, is that plaintiff is rude, tough, unjudicious, intemperate, undisciplined, and unfair as a judge. The gist or sting of the crystal ball allegation is that plaintiff is an eccentric who engages in, as ABC put it, "bizarre behavior." The gist or sting of defendant's broadcast is therefore not substantially similar to that of the supreme court's opinion. Therefore, the fact that plaintiff is estopped from contradicting the findings and conclusions of the supreme court does not affect his ability to prove ABC's allegation false.

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2. Plaintiff tries to make hay out of the fact that the Commission didn't "sustain" any claims relating to a crystal ball, apparently hoping the Court will infer that the Commission *rejected* such claims, including, perhaps, Johnson's account. In fact, the Commission did not *consider* any such claims, and Johnson did not testify before it.

Appendix B

D. *Other Issues*

Plaintiff places much weight on the fact that Longhini, the chief producer, destroyed all of his contemporaneous notes about the show, which makes it harder for plaintiff to show that Longhini knew the crystal ball allegation was false or doubted its truth. Plaintiff argues that the fact that Longhini destroyed these materials is "circumstantial evidence" of actual malice on his part. The only authority plaintiff cites for this, *Herron v. King Broadcasting Co.*, 109 Wash.2d 514 (Wash. 1987), was revised upon reconsideration and no longer makes any mention of this issue. *See* 112 Wash.2d 762 (Wash. 1989).

Longhini explains in his declaration the following: He worked for ABC on PrimeTime Live from 1993 to 1995. The show in question was broadcast on October 6, 1994. He left ABC in July 1995, for reasons unrelated to this case. Thereafter, while remodeling his home office in October or November 1995, he threw away *all* of his ABC materials, not just those relating to this show. He did not know of this suit at that time.

Plaintiff has no evidence to contradict any of this, but he does point out that while Longhini may have been unaware of the lawsuit, he did know that plaintiff had sent a retraction demand to ABC. Plaintiff adds that ABC acknowledged that it is "good procedure" for a producer to retain notes and files for some period of time. He argues that because he has been denied access to these documents, summary judgment would be unfair. This amounts to a contention that because plaintiff has been prevented from proving his case by documentary evidence that could have been obtained from one individual, the jury should simply find for him without any evidence. The fact that Longhini destroyed all of his ABC records does not tend to

make it more likely that at the time of the broadcast, ABC knew that the crystal ball allegation was false or subjectively entertained serious doubts as to its truth. The Court rejects this argument.

Plaintiff's last-ditch argument is that summary judgment should be denied under Rule 56(f) to allow him to depose Diane Sawyer. ABC has refused to permit him to depose her, and he says her deposition is the only discovery remaining that he wants to take. Plaintiff says that deposing Sawyer will establish three things: (1) she wrote or edited her own material for the broadcast; (2) she didn't do any investigation of anything in the broadcast; and (3) she knew the allegations in the broadcast were substantially untrue, or acted in reckless disregard of their truth or falsity.

The other ABC employees deny writing Sawyer's parts and say she wrote them, so plaintiff is probably correct as to (1). Plaintiff is probably correct as to (2) as well, since there is no evidence that Sawyer did any investigation for the segment involving plaintiff. But this doesn't get plaintiff anywhere, because even if Sawyer didn't do any investigation, many other ABC employees did, and it was not so reckless for her to rely on what they told her as to justify attributing actual malice to her. As to (3), plaintiff has no basis at all for saying that deposing Sawyer is likely to reveal such evidence, and if she did not do any investigation, it is extremely unlikely that she knew anything about the truth or falsity of anything.

A party seeking a Rule 56(f) continuance must show that he has diligently pursued discovery, must point to the "particular facts" which he expects the requested discovery to reveal, and must explain why such facts would preclude summary

judgment. *E.g., Mackey v. Pioneer Nat. Bank*, 867 F.2d 520, 524 (9th Cir. 1989). The Court concludes that plaintiff has not identified any "particular facts" which deposing Sawyer would reveal. "The burden is on the party seeking to conduct additional discovery to put forth sufficient facts to show that the evidence sought exists." *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1416 (9th Cir. 1987). It's too easy for plaintiff just to recite the legal standard which he must satisfy and then say that deposing, Sawyer will enable him to meet it; more specific information is required. Plaintiff has offered no information whatever with respect to why he thinks Sawyer would testify that she knew the allegations to be false or doubted their truth, and he has no basis for so contending. The Court rejects plaintiff's Rule 56(f) objection.

III. CONCLUSION

For the foregoing reasons, the Court holds that plaintiff has failed to present evidence from which a jury could find by clear and convincing evidence that defendant acted with actual malice in broadcasting the crystal ball allegation. The Court therefore GRANTS defendant's motion for summary judgment as to all of plaintiff's claims.

IT IS SO ORDERED.

DATED: July 30, 1996

s/ Stephen V. Wilson
STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

Appendix B

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. 95-6694 SVW (JRx)

HON. BRUCE W. DODDS,

Plaintiff,

v.

AMERICAN BROADCASTING COMPANY, INC., a Delaware corporation,

Defendant.

[~~PROPOSED~~] JUDGMENT

Defendant American Broadcasting Companies, Inc., having moved for summary judgment in Case No. 95-6694 SVW (JRx) pursuant to Rule 56, and the Court having considered the papers filed by both parties and the arguments of counsel and being fully advised,

Appendix B

IT IS HEREBY ORDERED that defendant's motion for summary judgment is granted in its entirety for the reasons set forth in the ~~Statement of Uncontroverted Facts and Conclusions of Law~~ Court Order of July 30, 1996 filed concurrently herewith, and that defendant be awarded its costs of suit, and that judgment be entered forthwith in the defendant's favor.

DATED: July 30, 1995

s/ Stephen V. Wilson
UNITED STATES DISTRICT JUDGE

Presented by:

MUNGER, TOLLES & OLSON

By s/ Steven M. Perry
Steven M. Perry

Attorneys for Defendant
AMERICAN BROADCASTING
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APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA FILED DECEMBER 22, 1995

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 95-6694 SVW (JRX)

HONORABLE BRUCE W. DODDS

Plaintiff,

v.

AMERICAN BROADCASTING COMPANY, INC., a Delaware corporation,

Defendant.

ORDER

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Background

Defendant American Broadcasting Company ("ABC") broadcasts a newsmagazine show called "PrimeTime Live." ("PrimeTime") On October 6, 1994, PrimeTime aired a segment entitled "Who's Judging the Judges?" The segment featured pieces on three judges, including one on Plaintiff, the Honorable Bruce W. Dodds, Senior Judge for the Superior Court of the County of Santa Barbara. The piece on Dodds was not flattering and Dodds now sues for slander *per se* and infliction of emotional distress based on overt and implied statements about him in the broadcast.

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The segment was premised on the notion that judges are protected from normal review and discipline even when they commit serious transgressions and that this protection can lead to flagrant abuses of the judicial power. The segment featured pieces on three judges. The first was a judge from Indiana who was an alleged pederast who used his position in the juvenile justice system to pressure sex from children. The second piece was on Dodds and generally made him out to be a judge who thinks he is a god in the courtroom and who uses little law or reason in his decisions. The final piece was on a Judge from South Carolina who used his position to sexually assault and harass female parties.

The pieces consisted of interviews with parties accusing the three judges of wrong-doing, statements by ABC reporter Cynthia McFadden about what others had told her or what others had said about these judges, unsuccessful attempts by McFadden to speak with Judge Dodds and the South Carolina judge, and observations by McFadden and anchor Diane Sawyer. Following the piece, Sawyer stated that Judge Dodds denied all the allegations against him. After the piece aired, Dodds allegedly asked for a retraction but ABC did not air one.

Legal Analysis

I. Standard for 12 (b)(6) Motion

In considering a motion to dismiss under F. R. C. P. 12(b)(6), the allegations of the complaint are taken as true, all reasonable inferences are drawn in favor of the Plaintiff, and the pleading is liberally construed in favor of the Plaintiff. *NL Industries, Inc. v. Kaplan,* 792 F.2d 896, 898 (9th Cir. 1986); *Rusell v. Landrieu,* 621 F.2d 1037, 1039 (9th Cir. 1980). The

motion is granted only if it appears beyond doubt that Plaintiff can prove no set of facts in support of the claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)

Normally, a court is limited to the allegations in the pleadings in considering a 12(b)(6) motion. However, where documents are attached to the pleading, a court can consider those documents and need not assume the truth of the allegations in the pleadings where the documents contradict the allegations. *Roth v. Garcia Marquez*, 942 F.2d 617, 625 n.1 (9th Cir. 1991). Moreover, a court may augment the pleadings by judicial notice of facts. *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1281 (9th Cir. 1986).

Here, Plaintiff attached a transcript of the PrimeTime show to the pleadings. Thus, the Court can and has considered the transcript in deciding this motion. In addition, counsel for ABC stipulated at hearing to allow Plaintiff to "attach" a videotape of the segment to the complaint. The Court watched the video at the hearing and considers the video in this motion.

Judicial Notice

ABC also asked the Court to take judicial notice of the "Findings, Conclusions, and Recommendations" of the Commission on Judicial Performance. The Court can take judicial notice that Dodds was under investigation by the Commission at the time of the broadcast and that the Commission was investigating charges similar to those alleged in the PrimeTime show and that the Commission made certain findings. However, the Court is not bound by the Commissions' findings of fact since they are not finalized findings and the specific findings are irrelevant to this motion.

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III. The Alleged Defamatory Statements

Because many of ABC's defenses apply to more than one alleged statement, the Court will lay out the alleged statements, review the basic law to be applied, and then apply that law to each statement to see which statements are actionable.

Based on a liberal interpretation of the complaint, Plaintiff alleges that the following defamatory statements were made either directly or impliedly during the broadcast.

1. Plaintiff's conduct was the same as that of a convicted or accused felon.

2. Plaintiff is one of the three worst judges in the country.

3. Plaintiff has participated in a secret cover-up of his improprieties.

4. Plaintiff is "unfit" to serve as a judge.

5. Plaintiff is a court jester/believes he is a god.

6. Plaintiff makes decisions based on a crystal ball.

7. Plaintiff is consistently reading magazines and newspapers on the bench.

8. Plaintiff is constantly yelling, screaming, and spitting in court.

9. Plaintiff improperly rushes cases through the system.

10. Plaintiff is disrespectful towards parties and witnesses.

11. Plaintiff constantly and wrongly pressures cases to settle for less than they are worth.

12. Plaintiff is hiding from public view.

13. Plaintiff is eluding discipline solely because serious allegations are not vigorously investigated, secrecy is used to protect him from serious charges, and the political climate protects him.

IV. Falsity was alleged

ABC makes the incorrect assumption throughout their papers that Dodds does not allege that any of the above statements are false. The complaint clearly states that "the broadcast and statements were false because . . . plaintiff's judicial conduct is and was proper . . . Complaint at 5, ¶ 11. Since the Court is to interpret the allegations liberally, the Court deems this statement to be an umbrella allegation that all of the alleged defamatory statements are false.

V. ABC's Defenses

The parties do not dispute that Dodds is a public figure and that the statements were aimed at matters of public concern. Thus, ABC can avail itself of substantial First amendment protections. Indeed, since the statements criticize the judiciary, an argument can be made that the Court should give ABC the benefit of the doubt as to close questions of constitutional protection. *see Landmark Communications, Inc. v. Virginia* , 435 U.S. 829, 839 (1978) (The operations of the courts and the

judicial conduct of judges are matters of utmost public concern.); *Partington v. Bugliosi*, 56 F.3d 1147, 1160 (9th Cir. 1995).

Public figure defamation actions against the media always present difficult issues requiring a balancing of private and public interests. On the one hand, "important social values . . . underlie the law of defamation." *Milkovich* at 2707. "[S]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation." *Id.* On the other hand, the First amendment promotes a marketplace of ideas and protects criticism of the government. The constitutional balance between these competing interests has evolved in a series of Supreme Court decisions. *New York Times, Co, v. Sullivan*, 84 S.Ct. 710 (1964) (Actual malice required); *Gertz v. Robert Welch, Inc.*, 94 S.Ct. 3004 (Malice must be shown by clear and convincing evidence); *Philadelphia Newspapers, Inc. v. Hepp*, 106 S.Ct. 1558 (1986) (No presumption of falsity in damages actions against media for matters of public concern); *Greenbelt Cooperative Publishing v. Bresler*, 90 S.Ct. 1537 (1970) (No liability for statements of rhetoric and hyperbole).

In any single case in which an individual public official appears to have been unfairly attacked by the media, the developed constitutional doctrines may seem to strike an improper balance. Indeed, in an individual case, in may be that the private harm outweighs the public good. But constitutional lines are drawn with a hearty margin of safety. This "breathing room" is built-in precisely because of the greater harm that would ensue if courts were left to fashion the proper balance within the narrow confines of individual cases. Where, as here, public figures and public issues are involved, the constitution looks beyond the individual case to the overall impact such

claims have on free speech. A sufficient margin of safety is needed to prevent the collective effect of individual defamation cases from chilling journalism. Thus, the constitutional restrictions strike the correct balance between individual harm from defamatory statements and the greater public harm that would come from a stilted media.

A. Neutral Reporting Privilege

Many of the alleged defamatory statements at issue in this case were "republished" by ABC. However, defamation law generally refuses to make a distinction between publishers and republishers of defamatory statements. *see* Campbell, *The Developing Privilege of Neutral Reportage,* 69 Va. L. Rev. 853 (1983). Nevertheless, some courts have recognized a so-called "neutral reporting" privilege. This alleged constitutional privilege immunizes a republisher from liability for defamatory statements where: 1) the statements are about public officials; 2) the official is embroiled in a public controversy; 3) the statements republished are made by participants in that controversy; and 4) republication was done in an accurate and neutral manner. *Barry v. Time,* 584 F.Supp. 1110 (N.D. Cal. 1984); *Ward v. News Group International, Ltd.,* 733 F.Supp. 83 (C.D. Cal. 1990). ABC relies, in large part, on this privilege for its defense.

The privilege has been adopted by the Second Circuit (*Edwards v. National Audobon Society, Inc.,* 556 F.2d 113 (2d Cir. 1976)) and has been considered but not rejected or adopted by the Supreme Court *(Harte-Hanks Communications, Inc., v. Connaughton,* 491 U.S. 657, 695, 109 S.Ct. 2678 (1989), the Fourth Circuit (*Chapin v. Knight-Ridder, Inc.* , 993 F. 2d 1087, 1097 (4th Cir. 1993), and the D.C. Circuit (*White v. Fraternal*

Order of Police, 909 F.2d 512, 528 (D.C. Cir. 1990). The Ninth Circuit has made no comment on the privilege, although two Ninth Circuit district courts have discussed it. *see Barry v. Time*, 584 F. Supp. 1110 (N.D. Cal. 1984); *Ward v. News Group International, Ltd.*, 733 F.Supp. 83 (C.D. Cal. 1990).

Plaintiff argues that the neutral reporting privilege was foreclosed by the Supreme Court in *Milkovich v. Lorain Journal Co.*, 110 S.Ct. 2695 (1990). In *Milkovich*, the Supreme Court rejected a constitutional privilege for "opinions." Plaintiff does not allege that the neutral reporting privilege is subsumed under the rejected opinion privilege. Rather, Plaintiff argues that *Milkovich* effectively closed the door on the creation of any new constitutional privileges for defamatory statements. This is plainly wrong.

Milkovich only addressed a proposed constitutional privilege for statements which could be categorized as "opinion" and not "fact." The Court reasoned that the distinction developed in prior case law between protected expressions of "pure" opinion and unprotected expressions which either directly or impliedly made factual assertions was sufficient to protect the "marketplace of ideas." *Milkovich* never addressed any other proposed First amendment privileges, including the proposed neutral reporting privilege, and never said that it was closing the door on the future development of other constitutional privileges for defamatory statements. Moreover, the Court's reasoning in Milkovich bears no relation to the rationale underlying the neutral reporting privilege.

The "opinion" privilege rejected in *Milkovich* aimed at protecting a broad class of *statements*. The neutral reporting privilege, in contrast, is not aimed at protecting the statement,

but at protecting the speaker/republisher of the statement. The privilege is premised on the idea that many newsworthy statements only reach the public via media republishing and that requiring the media to assess the trustworthiness of the original defamer would have a chilling effect on the dissemination of such statements. *Ward,* 733 F.Supp. at 84; *Edwards, supra* (Inherent value in nationally known organization making accusations about a matter of public concern). In *Milkovich,* the Court was asked to exempt a whole category of statements from liability regardless of the context in which they were made. The Court declined to do so because it felt that the private harm arising from the statements outweighed the public value of the statements. The Court never addressed the value of the media being able to distribute such statements. Thus, *Milkovich* was focused on a very different concern from the issue addressed by the neutral reporting privilege and should not be read to foreclose the further development of that privilege.

Assuming then that the neutral reporting privilege exists, the Court nevertheless finds that it is inapplicable in this case. When the media republishes defamatory statements, the harm from the statements is increased. To counter this magnified private harm, the privilege should be narrowly construed to instances where the public good of the reporting outweighs the private harm. In addition, since the rationale of the privilege is that it increases public access to information to allow the public to assess what is going on, it should also be narrowly limited to truly neutral reporting. *see Crane v. Arizona Republic,* 729 F.Supp. 698, 711 (C.D. Cal. 1989) (Rafeedie, J.) (Noting that neutral reporting 'privilege is narrower than state law "fair and true report" privilege.)

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The first question is whether the PrimeTime segment constitutes "neutral" reporting. In *Crane*, the court stated that the neutral reporting doctrine does not apply to "investigative journalism" which reports on things other than a "pre-existing, 'raging controversy.' " Moreover, the privilege does not apply where the media republisher "espouses or concurs in the charges" or "deliberately distorts" the charges. *Id.* at 711.

In *Ward v. News Group International, Ltd.*, 733 F.Supp. 83, the court found that the privilege applied to the republication by two defendants of the statements of a third. The posture of the case did not reveal the underlying facts. However, the court noted that the republication was accurate and that the story was "very neutral" because it published the Plaintiff's denial and "emphasiz[ed] the legitimate business success of Plaintiff and the extensive charity work he ha[d] done." *Id.* at 85. Considering the article as a whole, "the republication in the context of published denials and other information [did] not stand as defamatory." *Id.*

In *Edwards v. National Audobon Society, Inc.*, 556 F.2d 113 (2d Cir. 1977) — the case first adopting the privilege — the court found that the reporting was neutral. The article reported the accusations of the Society that five scientists were "paid liars." The article did not espouse the Society's accusations and included the scientist's terse reactions to the accusations. Moreover, the article was clearly *about* the fact that accusations were made, and did not purport to examine the factual premises for those accusations. (Headline read "Pesticide Spokesman Accused of 'Lying' on Higher Bird Count" and article clearly quoting from a Society publication.)

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In the case at hand, it would be stretching the developed doctrine to say that ABC's report was "neutral reporting." First, the segment is clearly investigatory in nature.[1] The report also implies that ABC concurs with the accusations in the report.[2] Ultimately, unlike the situation in *Edwards,* ABC's report was not about the accusations, but about the underlying conduct. The report is preceded by the statement "Cynthia McFadden *discovers* sexual abuse, drug charges, and bizarre behavior, protected by judicial robes." Thus, the segment does more than simply convey accusations made by others; it seeks to determine the likely truth or falsity of those accusations.[3]

Like the article in *Edwards,* the segment contains Dodds' denials of his accusations. However, unlike the article in *Edwards,* the overall tenor of the piece negates the value of those denials by subtly implying that ABC thinks the accusers are more credible than the accused. The entire segment condemns the judiciary as untrustworthy, a theme that would tend to undermine the credibility of blanket denials. Thus, the Court concludes that the segment is not neutral enough to fall within the ambit of the developing neutral reporting privilege.

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1. The show begins with a "teaser;" "Tonight, a PrimeTime *investigation.*" The segment is preceded by McFadden's statement that "[ABC/PrimeTime] decided to *take a closer look*" at "reports of judges as lawbreakers, sellouts, and just plain crazy."

2. Sawyer states "Say the word judge and you think of someone wise and fair and dignified. What you don't imagine is this."

3. Particularly noteworthy, for example, is that portion of the piece on Judge Dodds which features accusations that he uses a crystal ball in settlements. The piece does not simply report the accusation, but goes on to "confirm" the accusation by stating that PrimeTime "found (the crystal ball] still sitting on a table in Judge Dodds' chambers."

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B. "Implied" statements

Many of the statements Dodds is suing on are not overt statements. Rather, they are statements which Dodds claims are "implied" from juxtapositions in the report as well as the tenor of the report taken as a whole.

"Implied" factual assertions are actionable so long as the implied statements would be actionable if they were uttered directly. *Milkovich,* 110 S.Ct. 2695, 2707 (Alleged implied statement that coach perjured himself was actionable if a reasonable factfinder could conclude that the overt statements could imply the alleged factual assertion.) If a defamation claim is based on allegations of implied defamatory facts, the court must make a threshold determination whether the published statements could be understood as implying defamatory content. *Weller v. ABC*, 283 Cal.Rptr. 644, 650 n.8 (First Dist. 1991). If a statement is susceptible of both an innocent and defamatory meaning, it is for the jury to decide how they were in fact understood. *Id.* However, a claim cannot go forward on the allegation that the overall "message" of a broadcast is defamatory. *Auvil v. CBS 60 Minutes*, 67 F.3d 816 (9th Cir. 1995) .

In *Weller v. ABC*, 283 Cal.Rptr. 644 (1st Dist. 1991), the court found that news reports could imply that the Plaintiff had engaged in serious misconduct and thus that a jury would be permitted to view the broadcast and make their own determination whether it was defamatory. *Weller* at 651. The news reports in that case concerned the sale of an antique candelabra to a local museum. The report raised questions about whether the candelabra had been stolen and whether it had been sold to the museum for a "grossly inflated price." Although the

report never stated that Weller had stolen the candelabra, the court found that such an implication could be drawn where: 1) the report repeatedly tried to tie Weller to a convicted felon whom the report implied had stolen the candelabra; 2) the report concerning Weller was juxtaposed against an immediately preceding report about the convicted felon; 3) the report falsely noted that Weller's shop was only a block from the house of the woman from whom the candelabra allegedly had been stolen; 4) the broadcast stated that Weller was "reportedly" out of town, suggesting that Weller had a guilty conscience and was avoiding publicity. *Id.* In addition, the court noted that the report implied that Weller and his associates were "stonewalling" the reporter. The court concluded that, taking all of these facts together, a reasonable juror could conclude that the report implied that Weller was involved in "shady dealing."

Weller also dealt with the special problems of applying traditional defamation concepts to the reality of televised "news" reports. The court noted that characterizing a news report as an "ongoing investigative report" did not immunize the report. "[T]he publication of implied defamatory statements against a background of apparently objective and neutral reporting is almost certain to be understood as factual. Moreover, the implied defamatory facts in this context may be given even more credence by the listener, where . . . the reports profess to be objective, yet subtly imply that the publisher tends to believe the sources alleging the defamatory facts." "[M]erely couching an assertion of defamatory fact in cautionary language such as "apparently" or "some sources say" or even putting it in the form of a question" does not insulate a speaker from a defamation action anymore than phrasing an assertion as an "opinion." *Id.* at 652.

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C. Non-factual/Non-specific statements

The First amendment protects statements on matters of public concern which are incapable of being proven true or false by reference to a core of objective evidence. *Milkovich*; *Weller*; *Standing Committee v. Yagman*, 55 F.3d 1430 (9th Cir. 1995). Statements of "subjective fact" such as "he did not try the case well," when made in matters of public concern, are protected. *Partington v. Bugliosi*, 56 F.3d 1147, 1160 (9th Cir. 1995). However, facts which are objectively verifiable such as "this product does not perform as advertised" are actionable. *Unelko v. Rooney*, 912 F.2d 1049 (9th Cir. 1990) (Statement about product that "it didn't work" was actionable where product made specific claims of how it would improve wet weather visibility when applied to windshields). Finally, a statement is actionable even if it asserts that a person or thing possesses a quality which is not susceptible to precise measurement, so long as there is an objective way to measure where that person or thing falls within a reasonable range. *Weller*. Whether a statement contains provably false factual assertions is a question of law for the court to decide. *Unelko*, 912 F.2d 1049, 1053 (9th Cir. 1990); *Weller*, 283 Cal.Rptr; at 651, n.9.

In *Partington*, a lawyer sued the author of the book "And the Sea Will Tell" for statements in the book criticizing the lawyer's performance in a highly publicized murder case. The court found that readers of a lawyers' account of a proceeding would expect the account to contain only "highly subjective opinions . . . rather than assertions of verifiable, objective facts. *Id.* at 1154 *citing Moldea v. New York Times*, 22 F.3d 310 (D.C.Cir. 1994) (Importance, even after *Milkovich*, of evaluating a critical analysis "with an eye toward readers'

expectations and understanding [of it]") . Likewise, the court found that viewers of a docu-drama would not expect the broadcast to be a wholly accurate portrayal of historical facts.

The court also concluded that "assessments of a lawyer's trial performance are inherently subjective and therefore not susceptible of being proved true or false." *Id.* at 1157-58. The court noted with approval the decision of the D.C. Circuit in *Moldea* which similarly held that criticism's of a journalist's "sloppy journalism" and unprofessional techniques are not actionable under *Milkovich.* "Where the question of truth or falsity is a close one, the court should err on the side of nonactionability." *Partington* at 1159, quoting *Moldea,* 22 F.3d at 317.

In *Standing Committee v. Yagman,* 55 F.3d 1430 (9th Cir. 1995), the court held that, under *Milkovich,* statements by a lawyer that a judge was "dishonest" were not actionable, but a statement that the judge was "drunk on the bench" was actionable.[4] The court found that the use of the term "dishonest" was not actionable for three reasons. First, it did not imply any specific criminal or other wrongful act. Second, it was one of a string of invectives hurled at the judge by the lawyer and was thus only another form of hyperbole for expressing the lawyer's contempt for the judge. Finally, the court found that the term could imply "intellectual dishonesty" but that intellectual dishonesty was a trait which could not be measured against a "core of objective evidence." *Id.* at 1440-41.

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4. Although the latter statement was actionable because it asserted a specific and objective fact, the court concluded that the statement could not give rise to sanctions where the Committee had presumed falsity and had not introduced any evidence to show the falsity of the statement. *Standing Committee,* 55 F.3d at 1441-42.

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D. Rhetoric/Hyperbole

The First amendment protects statements which cannot reasonably be interpreted as stating actual facts. *Milkovich.* "Even statements that at first blush appear to be factual are protected by the First amendment if they cannot reasonably be interpreted as stating actual facts about their target." *Standing Committee,* 55 F.3d at 1438. "Thus, statements of 'rhetorical hyperbole' aren't sanctionable, nor are statements that use language in a 'loose, figurative sense.' " *Id.* (citations omitted). Whether a statement could be reasonably understood as an assertion of fact as opposed to hyperbole or loose figurative expression is a question of law for the court. *Weller*, 283 Cal.Rptr. at 651, n.9.

In *Standing Committee, supra,* the court held that the following comments about a judge were immune from disciplinary sanctions because they were hyperbole and rhetoric which a reasonable person would not believe conveyed actual facts: Yagman said that Judge Keller was ignorant, ill-tempered, buffoon, substandard human, right-wing fanatic, bully, one of the worst judges in the U.S.

E. Opinions Based on Disclosed Truthful Facts

Opinions based on disclosed truthful facts are not actionable. *Standing Committee; Lewis v. Time, Inc.,* 710 F.2d 549 (9th Cir. 1983) ; Rest. 2d Torts § 566. Under this privilege, the statement "I think Jones is an alcoholic"' is actionable but the same statement is immunized if it is preceded by the *truthful* statements "Jones moved in six months ago. I have seen him only twice, in his backyard with a drink in his hand." The second set of statements allows the hearer to assess the validity of the

conclusion "Jones is an alcoholic." *see Standing Committee*, 55 F.3d at 1439. The Court refers to this as the "disclosed facts" privilege.

VI. Application

1. Plaintiff's conduct was the same as that of a convicted or accused felon.

Dodds claims that the juxtaposition of the pieces in the broadcast implies that Dodds' conduct is "the same as" that of the accused pederast judge from Indiana and/or the judge convicted of sexual assault in South Carolina. The Court does not find that the statements in the broadcast are susceptible of such an implied assertion. Unlike the reports in *Weller* implying a link between Weller and a convicted felon, the pieces in the PrimeTime segment clearly distinguish the three judges; the report states that they are thousands of miles apart and also gives the specific factual underpinnings for the alleged wrongdoing of each judge. The only assertion of commonality is that these are all "bad" judges in some way. Such an assertion is not sufficiently concrete and factual to be actionable. *see Standing Committee.*

2. Plaintiff is one of the three worst judges in the country.

This statement is very close to statements made by attorney Yagman about Judge Keller in *Standing Committee. Standing Committee* said that the statement that Judge Keller was "the worst judge in the United States" was hyperbole and rhetoric and therefore not actionable. *Standing Committee* is distinguishable however, since Yagman hurled his insult in a stream of outrageous hyperbole and rhetoric. Here, it could be

argued that the context in which the implied assertion was made — a network newsmagazine — tends to make it a more factual assertion. *see Weller, supra* (Background of purportedly objective news report lends "factual" air to implied statements).

Nevertheless, the statement is not actionable. The segment does not purport to draw on any objective survey or rating of American judges. Rather, the introduction to the segment says that the Judges depicted are only "some" of the judges whose "conduct seems downright scandalous." Transcript at 1, Diane Sawyer. The term "downright scandalous" is hyperbole, not a statement of fact.

The most the segment implies is that it is focusing on these judges because the charges against them are serious and not frivolous like the majority of complaints about judges. Transcript at 2, Cynthia McFadden. Unlike a direct assertion that the judge's conduct was felonious, saying that alleged misconduct is "serious" does not state a fact which can be proved false by reference to a "core of objective evidence." Moreover, Dodds does not claim that the charges against him were not "serious," so McFadden's statement cannot be defamatory. Thus, giving Plaintiff the benefit of the doubt, the Court finds that the alleged implied statement that Dodds was one of the three worst judges in the United States is not actionable.

3. Plaintiff has participated in a secret cover-up of his improprieties.

The Court finds that the segment is not reasonably susceptible to any implication that Dodds participated in a cover-up. Unlike the statements in *Weller*, the statements about

secrecy here clearly state that it is the State judiciary commission, not the judge, who is being secretive. Transcript at 3, McFadden; at 4, Sawyer. Moreover, the tenor of the piece implies that it is the disciplinary process, not the judges being disciplined, which is overly secretive and self-serving. For example, immediately following the statement about the secret investigation of Dodds is a piece on a South Carolina judge that it highly critical of an insulated and self-serving judicial discipline process. Thus, in terms of traditional defamation law, there is no implication of the "colloquium" element.

4. Plaintiff is "unfit" to serve as a judge.

The piece does imply that Dodds is "unfit" to serve as a judge. However, an assessment about whether a judge is fit to serve is not an objectively verifiable assessment, at least where it is not based on allegations of legal improprieties, corruption, physical/mental incapacities, or ratings made by bar associations or similar bodies. For example, in *Standing Committee*, the court said that an allegation that Judge Keller was "dishonest" was not actionable, whereas an allegation that he was "corrupt" or had taken bribes would be. Here, the implied statement that Dodds is "unfit" to serve as a judge arises from allegations about his judicial temperament, his approach to case management, and his personality in general. Whether such factors would make a judge "unfit" are matters of subjective taste, much like the assessment of a lawyer's abilities deemed unactionable in *Partington*.

There could be cases in which an assertion that a judge was "unfit" would be actionable as an objectively verifiable fact. For example, if Judge Dodds' fitness for judicial service had actually been assessed by a competent body, then the

assertion would be verifiable. *see Gill v. Hughes,* 278 Cal.Rtpr. 306 (assertion that surgeon was "incompetent" was provably false where there was an evidentiary hearing in another proceeding on surgeon's competence) . Here, there is no ready method to determine objectively whether the facts asserted in ABC's report would or would not make Judge Dodds "unfit" for judicial service.

5. Plaintiff is a court jester/believes he is a god.

Such statements are clearly along the lines of the sort of hyperbole and rhetoric found to be non-sanctionable in *Standing Committee.* (Comments that Judge Keller was a "buffoon" and a "sub-standard human.") The statement that Dodds thinks he is a god is clearly stated in a sarcastic manner implying that Dodds is power-happy, not that he has actual delusions that he is Zeus, Krishna, or any other deity.

6. Plaintiff makes decisions based on a crystal ball.

The implied assertion that Plaintiff says a viewer would draw from the show is that Dodds "only makes decisions based on a crystal ball." Complaint, ¶ 9(c):23-24. This is a specific and verifiable allegation. Moreover, it is an implied assertion which a reasonable person could draw from the segment, especially since McFadden introduces the segment by implying that Dodds uses something other than wisdom and a superior grasp of the laws to justify his decisions. Transcript at 2, McFadden.

This assertion should be actionable unless it falls within the "disclosed facts" privilege. The actual facts in the story relating to the crystal ball are as follows: 1) a statement that

Dodds "used" the crystal ball in a settlement conference, 2) that he has used the ball to "support" his decisions, and 3) that the ball sits on Dodds' table in chambers. Dodds denies, however, that he ever used the crystal ball to support his decision. In contrast, Dodds asserted at hearing that the ball was used purely in jest. Thus, because Dodds denies the truth of the revealed facts, the implied assertion is not protected by the disclosed facts privilege and is actionable.

> 7. Plaintiff is consistently reading newspapers and magazines on the bench.

This is a specific allegation reasonably implied from factual assertions made in the broadcast. The segment includes a direct statement that complaints about Dodds" judicial temperament include reading newspapers and magazines on the bench. In addition, the segment implies that such activities happened on a regular basis; the segment notes that there has been a "stream" of complaints regarding Judge Dodds' behavior and purports to rely on a former court clerk who, audiences may fairly assume, would have had occasion to see Judge Dodds' alleged literary activities on more than one occasion. *see Partington* (Court can consider how audience is likely to perceive context in which statement is presented).

> 8. Plaintiff is constantly yelling, screaming, and spitting in court.

Similar to the above statement, this is a specific allegation reasonably implied from factual assertions made in the broadcast. Transcript at 2, McFadden (Complaints about judicial temperament including yelling, screaming, and spitting). Therefore, the statement is actionable.

9. Plaintiff improperly rushes cases through the system.

This statement is reasonably implied from the segment. However, it os not actionable because it is not objectively verifiable. One could verify whether a judge tends to move his cases at a rapid pace. However, the mere allegation that a judge moves his calendar quickly is not, standing alone, a defamatory comment. The defamatory implication is that Dodds rushed cases "improperly." There is no way to objectively verify whether a judge has acted improperly in moving cases through the calendar.

10. Plaintiff is consistently disrespectful towards parties and witnesses.

This is an assertion which a reasonable person could find is implied from the broadcast. However, the statement is not actionable. Whether someone is "respectful" is generally a subjective matter. An argument could be made that, in applying the term "disrespectful" to judges, a narrow and verifiable definition could be drawn from judicial disciplinary proceedings. However, the segment used the term "disrespectful" outside the context of a disciplinary process and there is no implication that the statement relied on any disciplinary findings of disrespect. Therefore, the Court concludes that the implied statement is not actionable because it is not sufficiently concrete or factual.

11. Plaintiff wrongfully and constantly pressures cases to settle for less than they are worth.

This statement may be fairly implied from the segment. However, like the statement above that Dodds "improperly"

rushes cases through the system, the assertion that an application of settlement pressure was "wrongful" is too vague a statement to be actionable. "Wrongful" can range from "unsuitable" and "inappropriate" to "impermissible" or "evil." The New American Roget's College Thesaurus In Dictionary Form, (1985). These words can imply pressuring a settlement because of a misunderstanding of the claims and facts, pressuring a settlement because of a personal dislike for a party, or pressuring settlement because the judge is due a kickback. Thus, the statement that a judge "wrongfully" pressures' settlements is much like the statement that a judge is "dishonest" rejected in *Standing Committee* as inactionable.[5]

12. Dodds is hiding from public view.

The report only states that Judge Dodds refused an interview, stating that state law prevented him from talking about the case. It also shows him avoiding reporter McFadden when she approaches him as he gets into his car. However, it is

---

5. The Court acknowledges that *Standing Committee* was not a defamation action, but a disciplinary proceeding. Plaintiffs argue that *Standing Committee* cannot serve as a guide in this case because the attorneys' statements are afforded a higher level of First amendment protection than ordinary defamatory statements. This is patently wrong. *Standing Committee* relies on a line of cases clearly holding that attorneys' statements about judges receive *less* First amendment protection than ordinary defamatory speech. *see U.S. District Court for E.D. of Wash. v. Sandlin*, 12 F.3d 861, 867 (9th Cir. 1993) (Lower standard of proof and objective malice standard can be applied in disciplinary action against lawyer for statements critical of judge). Thus, if *Standing Committee* deemed statements inactionable under the First amendment despite a lower standard of protection, it is *a fortiori* that similar statements are inactionable in a run-of-the-mill defamation action where the level of protection is higher.

not reasonable to conclude from this that he is "hiding" from public view.

In *Weller, supra,* the court found that the reporting technique of portraying the target of the report as "stonewalling" implied that the target "had something to hide." In *Weller*, the reporter sarcastically stated that the target was "reportedly" out of town, implying that he was not and was just hiding.

"Hiding" implies that Dodds has no legitimate reason not to speak on camera. The ABC report does not make such an implication. Unlike the reporter in *Weller,* McFadden does not use a sarcastic tone when she states Dodds' reason for not speaking with her and the segment does not imply that Dodds' stated reason was not true. If anything, the report condemned state laws and procedures which kept judicial investigations secret, bolstering the credibility of Dodds' statement that he was prohibited by law from speaking about the case. The only thing reasonably implied from the ABC report is that such laws are wrong because judges are public figures who should be required to submit to public questioning. Such a statement is not a statement about Dodds, but about the judicial discipline system. Therefore, the Court finds that no reasonable jury could find that the PrimeTime segment implies that Dodds is "hiding" from public view.[6]

13. Plaintiff is eluding discipline solely because 1) serious allegations are not vigorously investigated, 2) secrecy is used to protect him from serious charges, and 3) the political climate protects him.

---

6. The Court also notes that earlier in the report, Dodds is shown on a videotape denying charges by Cindy Hart. This tends to negate any argument that the segment implies that Dodds is hiding from public view.

Appendix C

The statement from which the alleged assertion is drawn in no way states that the three reasons given are the "only" reasons problem judges are not disciplined. Transcript at 4, McFadden. Rather, it states that these three reasons are "often" "factors." More importantly, there is no implication in the report that Dodds is "eluding" discipline. If anything, the report makes it clear that a Commission was investigating Dodds and that investigation was still pending at the time of the report. Finally, the Court finds that, even if such a statement were reasonably implied, it would not be a statement of or concerning Dodds, but rather another statement condemning the judicial disciplinary system. Therefore, the Court finds that the alleged defamatory statement is not actionable.

VII. Intentional Infliction of Emotional Distress Claims

The above conclusions about the constitutional protections for ABC's statements in the defamation action apply equally to Dodd's claim for intentional infliction of emotional distress. *Hustler Magazine v. Falwell*, 108 S.Ct. 876 (1988) (Constitutional protections for defamatory speech also extends to claims for intentional infliction of emotional distress premised on injury from "offensive publication."). Thus, Dodds may pursue his claim for emotional distress only as to the statements regarding 1) the crystal ball, 2) screaming, yelling, and spitting, and 3) reading newspapers and magazines on the bench.

VIII. Conclusion

The Court DENIES ABC's motion to dismiss under F.R.C.P. 12(b) (6). Dodds has alleged publication of three actionable statements. Therefore, his claims may proceed at this point on the basis of those three statements.

Appendix C

IT IS SO ORDERED.

DATED: 12-21-95

s/ Stephen V. Wilson
STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JULY 9, 1998

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-56300

D.C. No. CV-95-06694-SVW

HONORABLE BRUCE W. DODDS,

Plaintiff-Appellant,

v.

AMERICAN BROADCASTING COMPANY, INC., a Delaware Corporation,

Defendant-Appellee.

ORDER

Before: REINHARDT and TASHIMA Circuit Judges, and FITZGERALD, Senior District Judge.*

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc, and

---

* The Honorable James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Supreme Court, U.S.
FILED
DEC 8 1998
CLERK

No. 98-601

In The

Supreme Court of the United States

October Term, 1998

HONORABLE BRUCE W. DODDS,

Petitioner,

vs.

AMERICAN BROADCASTING COMPANY, INC.,
a Delaware Corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondent American Broadcasting Companies, Inc. hereby submits this statement identifying its parent companies and nonwholly owned subsidiaries. American Broadcasting Companies, Inc. has no nonwholly owned subsidiaries. The parent company of American Broadcasting Companies, Inc., is ABC, Inc. (formerly known as Capital Cities/ABC, Inc.). On February 9, 1996, The Walt Disney Company completed its acquisition of Capital Cities/ABC, Inc., which is now a wholly owned subsidiary of The Walt Disney Company. Therefore, American Broadcasting Companies, Inc. is an indirect subsidiary of The Walt Disney Company, which is the entity whose shares are currently traded.

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INTRODUCTION

Respondent American Broadcasting Companies, Inc. ("ABC") respectfully submits this brief in opposition to petitioner Bruce W. Dodds' petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. For the reasons set out below, the petition presents no issue appropriate for review by this Court and should be denied.

STATEMENT OF THE CASE

The petitioner in this action is Bruce W. Dodds, who was, at the time of the ABC broadcast at issue, an elected member of the Superior Court of the County of Santa Barbara, California. On October 6, 1994, ABC broadcast a report during its news magazine show "PrimeTime Live" that focused on the systems in place to address allegations of misconduct and inappropriate behavior on the part of state court judges. The purpose of the report, according to one of its producers, "was to look at what kind of disciplinary action there is against judges, and when certain allegations come up, allegations of misconduct, how the system handles those allegations." In addition to a general discussion of judicial disciplinary proceedings, the report focused on allegations that had been made regarding three specific judges, including Judge Dodds.[1]

ABC reporter Cynthia McFadden introduced the segment about Judge Dodds by noting that in the past several years, "a stream of complaints has been aimed at Judge Dodds over his

---

1. At the time of the broadcast, Judge Dodds was under investigation by the California Commission on Judicial Performance because of allegations that he had interfered with a law enforcement investigation and had displayed rudeness and prejudgment in handling cases. *See Dodds v. Commission on Judicial Performance*, 12 Cal. 4th 163, 168, 906 P.2d 1260 (1995).

judicial temperament, or lack of it." After airing Judge Dodds' statement that he had done nothing wrong, the report stated that a former court clerk for Judge Dodds had said in a sworn declaration that Dodds had screamed and spit in court and had read newspapers and magazines while on the bench.

The report then focused on another litigant, Ms. Christine Johnson, who had appeared before Judge Dodds in 1992. Ms. Johnson and her son had been suing the Catholic Church because, she alleged, a priest had molested her son. Ms. Johnson said that during a settlement conference in the case, Judge Dodds had told her, in her son's presence, that the molestation had "only happened twice" and was "no big deal."

ABC reporter McFadden noted that "Johnson says" that Judge Dodds had pressured her to accept a low settlement. Ms. Johnson then described how Judge Dodds had referred to a crystal ball to confirm the propriety of the settlement amount:

> Christine Johnson: He had a crystal ball on the settlement conference table where he asked us to sit.
>
> Cynthia McFadden: Did he use this crystal ball?
>
> Christine Johnson: Yes, he did. He said, "This is what I think your case is worth," and then pressed a button on the crystal ball and it answered "Yes." And he said, "There it is. That's it. That's what you get."

ABC reporter McFadden then noted that "[l]awyers, litigants and [Dodds'] former clerk all say Dodds often used the crystal ball to support his decisions."[2]

---

2. In the introduction to the broadcast, a different litigant was also heard saying that an unidentified judge "uses a crystal ball often, even in adoption cases."

The report then showed Ms. McFadden's unsuccessful attempt to interview Judge Dodds, and it quoted his reason for refusing to be interviewed:

> We asked for an interview with the judge, but he refused, saying state law prevented him from talking about the case.

The report's segment regarding Judge Dodds ended by pointing out that an ABC reporter had seen a crystal ball sitting on a table in Judge Dodds' chambers.

At the conclusion of the entire report, ABC News anchorwoman Diane Sawyer repeated that Judge Dodds had "denie[d] the allegations against him"; she further stated that the California Commission on Judicial Performance would not confirm or deny that it was investigating allegations involving Dodds.

The Commission on Judicial Performance issued Findings of Fact and Conclusions of Law regarding Judge Dodds in February 1995, four months after the broadcast. Although the Commission did not mention Judge Dodds' crystal ball in its Findings and Conclusions, it did find that Dodds had committed misconduct by interfering with a law enforcement investigation involving a different judge and by frequently exhibiting rudeness and prejudgment in his cases. *See Dodds*, 12 Cal. 4th at 167-68. The Commission recommended that Dodds be publicly censured. *Id.* Judge Dodds appealed the Commission's findings and conclusions to the California Supreme Court. *Id.* That Court subsequently issued an opinion that rejected the Commission's recommendation that Judge Dodds be publicly censured for his misconduct. The Court concluded, however, that "clear and convincing evidence supports the Commission's findings of fact." *Id.* at 168-70. In particular, the California

Supreme Court held that Judge Dodds had brought disrepute upon the judicial office by acting improperly during settlement conferences:

> [Dodds] argues that his "assertive" judicial "style" is desirable because it enables him to effect settlements in difficult cases. [Dodds'] argument betrays an understanding of the judicial role that places too much emphasis on the efficient disposition of cases and too little emphasis on the dignity of litigants. . . . Even an otherwise just settlement, if imposed summarily and coercively, is likely to disserve justice by leaving the parties with a lingering resentment of one another and the judicial system. We laud the creative and diverse means by which judges assist parties in reaching voluntary settlements of complex disputes. But when a judge, clothed with the prestige and authority of his judicial office, repeatedly interrupts a litigant and yells angrily and without adequate provocation, the judge exceeds his proper role and casts disrepute on the judicial office.

Dodds, 12 Cal. 4th at 176-77.

In October 1995, Dodds filed suit against ABC in federal court in Los Angeles. Dodds' complaint asserted claims under California law for defamation and intentional infliction of emotional distress. Dodds claimed that he had been defamed by various explicit statements contained in the broadcast as well as by several negative implications that, he claimed, arose from the broadcast. Federal jurisdiction was premised upon the diversity of the parties.

In June 1996, ABC moved for summary judgment on each of Dodds' claims. After continuing the hearing on ABC's motion and permitting additional discovery and briefing, the district court granted the motion on July 30, 1996. Pet. App. 34a-50a.

The only allegedly defamatory statements or implications that were at issue at the time the district court entered summary judgment related to Judge Dodds' use of a crystal ball. As the district court explained,

> [t]he crystal ball issue relates to the allegations that [ABC] slandered [Judge Dodds] by *stating* that he uses a crystal ball to *support* his decisions and by *implying* that he only *makes* decisions based on a crystal ball.

Pet. App. 35a (emphasis in original).

After reviewing the evidence submitted by the parties, the district court first held that Judge Dodds had not met his burden of establishing that ABC had acted with actual malice in broadcasting the statement that Dodds used his crystal ball to *support* his decisions. Pet. App. 38a. The district court began its actual malice analysis by placing the burden upon Judge Dodds to show that ABC either "realized that [its] statement was false or that [it] subjectively entertained serious doubt as to the truth of [its] statement." *Id.* at 37a, *quoting Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 511 n.30 (1984). The district court also explained that the "actual malice" requirement is a *subjective* one, and that only the existence of "sufficient evidence to permit the conclusion that the defendant actually had a high degree of awareness of . . . probable falsity" would suffice to meet the plaintiff's burden. *Id.*, *quoting Harte-*

Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 660 (1989).[3]

Applying this test to the record before it, the district court then noted that:

> (1) each of the individuals involved in the ABC broadcast had testified that he or she did not doubt the truth of the broadcast's crystal ball-related statements;
>
> (2) ABC had not relied on its initial sources "blindly and exclusively," but had talked to Dodds' former court clerk, an adoption case worker and several lawyers about Dodds' use of his crystal ball. These individuals had confirmed that Dodds used a crystal ball to support his decisions or to "demonstrate that he was right;" and
>
> (3) ABC had confirmed firsthand that plaintiff had a crystal ball on a desk in his office.

Id. at 37a, 40a.

The district court concluded that

> this is not a case where it would be appropriate to say that the sources relied upon were so untrustworthy, what they said was so improbable, and the investigation was so negligible, that ABC

3. As discussed more fully in Section III below, both of these conclusions regarding Dodds' burden of proof were consistent with a prior filing by Dodds in the district court where Dodds had stated that he did not dispute ABC's position regarding the applicable legal standard on the issue of "actual malice."

> can be said, without any evidence, to have subjectively entertained serious doubts as to the truth of its statements.

Pet. App. 41a. *See also id.* (finding "nothing whatever in the record indicating that ABC ever took any action intentionally designed to avoid discovering the truth").[4]

The district court also rejected Judge Dodds' defamation claim based upon the purportedly *implied* statement by ABC that Dodds "only *makes* decisions based on a crystal ball." Pet. App. 35a (emphasis in original). The district court noted that Dodds had agreed that it was his burden to establish "by clear and convincing evidence that ABC in fact 'intended that the [broadcast] be read to contain the defamatory innuendos the plaintiff attributes to it.' " *Id.* at 41a, *quoting Woods v. Evansville Press Co.*, 791 F.2d 480, 486-87 (7th Cir. 1986). As the district court put it, in order

> to withstand summary judgment, [Dodds] would . . . have to present evidence from which a jury could find both that ABC knew the inference to be false (or seriously doubted its truth) *and* that it intended the inference to arise.

Id. at 41a-42a (emphasis in original).

---

4. Petitioner tells this Court that ABC's actual malice should have been inferred from the fact that, over one year after the broadcast, an ABC producer discarded his notes and files relating to the broadcast. Pet. 4-6. As the district court noted, however, it was undisputed that the producer had thrown away *all* of his ABC-related materials, not just his materials regarding this particular story, after he had left ABC and while he was remodeling his home office, and that the producer did not know of Dodds' suit at the time. Pet. App. 46a.

The district court held that Dodds had not met this burden. The court pointed out that: (1) the ABC witnesses had testified that they did not intend that the broadcast imply that Dodds used his crystal ball to *make* decisions; (2) Dodds had no contrary evidence; and (3) Dodds' argument that the alleged implication was self-evident from the broadcast was no substitute for the evidence of *subjective* intent required by the actual malice standard. Pet. App. 42a-43a, *citing Newton v. National Broadcasting Co., Inc.*, 930 F.2d 662, 668 (9th Cir. 1990).

On appeal, the Court of Appeals for the Ninth Circuit affirmed the district court's entry of summary judgment (and its earlier ruling dismissing certain of Dodds' claims at the Rule 12(b)(6) stage). Pet. App. 1a-33a. With respect to the question whether petitioner had presented sufficient evidence that ABC had broadcast with actual malice the *explicit* statement that Dodds had often used his crystal ball to *support* his decisions, the court of appeals cited many of the same factors upon which the district court had relied:

> [W]e note that numerous sources informed ABC that they were personally aware of Judge Dodds's use of the crystal ball in the manner suggested by the litigants who actually appeared in the broadcast. These additional sources included other litigants, a former clerk, and attorneys who had dealings with Judge Dodds. In addition, although its methods of obtaining the information left something to be desired, ABC confirmed that a crystal ball sat on Judge Dodds's table in chambers. . . .

Id. at 16a. The court of appeals further noted Dodds' admission in his deposition "that he had in fact used the crystal ball during the settlement negotiations involving Johnson." *Id.* at 16a, n.4.[5]

5. Christine Johnson was the woman who had described Dodds' use of the crystal ball during a settlement conference.

The court of appeals also affirmed the district court's entry of summary judgment on that portion of Dodds' defamation claim that was based upon ABC's *implied* statement that he used the crystal ball to *make*, not just to *support*, his decisions. The court addressed this claim in two analytically distinct steps. First, the court asked whether a reasonable jury "could find that ABC was stating by implication that Judge Dodds in fact decided issues by consulting the crystal ball." Pet. App. 22a. Second, the court asked whether a jury "could reasonably find by clear and convincing evidence that ABC 'intended to convey the defamatory impression.' " *Id.* at 21a, *quoting Newton*, 930 F.2d at 681.

As for the first step, the court of appeals agreed with Dodds that a jury could reasonably find that the broadcast had implied that he had used his crystal ball to make judicial decisions. Pet. App. 22a. With respect to the second step, the court held — essentially for the reasons cited by the district court — that Dodds had not come forward with sufficient evidence that ABC had subjectively intended to convey that defamatory impression. *Id.* The court also rejected Dodds' suggestion that it utilize "an objective, 'reasonable viewer' standard" in order to decide Dodds' libel-by-implication claim. *Id.* at 23a. The court, applying the principles of *New York Times* and the test established in the Ninth Circuit's prior decision in *Newton*, "reaffirmed" that a plaintiff alleging a defamatory implication must show not only that the statement in question could give rise to the defamatory implication, but also that the defendant "actually intended to convey the defamatory impression." *Id.* As the court of appeals explained:

> the *Newton* test requiring a clear and convincing showing of subjective or actual intent strikes the proper balance between protecting victims of defamation and protecting against the possible

> chilling effect that results from overly broad applications of our defamation laws.

Id. at 23a-24a, citing *Newton*, 930 F.2d at 681. In so holding, the court of appeals observed that "all of the courts of appeal that have considered cases involving defamation by implication have imposed a similar actual intent requirement." *Id.*, citing *Chapin v. Knight-Ridder*, 993 F.2d 1087, 1093 (4th Cir. 1993), and *White v. Fraternal Order of Police*, 909 F.2d 512, 520 (D.C. Cir. 1990).

This last issue is the *only* issue as to which petitioner seeks review by this Court. Petitioner does not challenge the dismissal of *any* claim based upon statements *actually contained* in the ABC broadcast. Instead, he asks this Court to hold that a public official may prevail on a claim that he has been libeled by an *inference* contained in a news report as long as the inference is one that a reasonable viewer could draw, regardless of whether the statements *actually* made in the report are protected from liability by the First Amendment, and regardless of whether the publisher *subjectively* intended to convey the allegedly defamatory inference.

For the reasons set out below, this Court should deny the petition. First, the court of appeals applied well-settled law established in *New York Times v. Sullivan*, 376 U.S. 254 (1964), and its progeny. This Court has made clear that a public official cannot recover for a defamatory falsehood unless he or she proves with "convincing clarity" that the false statement was made with "actual malice." *See id.* at 285-86. The court of appeals simply applied this well-established test to the facts alleged in this case, agreeing with other circuit courts that the "actual malice" test applies equally when the alleged defamation is through an *implication* rather than a direct statement. The objective, "implied malice" approach suggested

by petitioner is illogical, has not been adopted by any court of appeals, and would eviscerate the broad protections for reporting on the conduct of public officials that were established in *New York Times* and the cases following it.

Second, there is no conflict among the circuit courts on the issue presented here. The cases that petitioner cites to support a claimed conflict either were decided wholly as a matter of state law, or are entirely consistent with the Ninth Circuit's decision here.

Finally, petitioner expressly stipulated in the district court — as the district court noted in its opinion granting summary judgment — that it was his burden to prove by clear and convincing evidence that ABC in fact intended to convey the defamatory implication in question. Pet. App. 41a. Petitioner has thereby waived the issue raised in his petition. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976).

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS' DECISION APPLIES THIS COURT'S WELL-SETTLED PRECEDENT, UNDER WHICH A PUBLIC OFFICIAL ASSERTING A LIBEL CLAIM MUST SHOW BY CLEAR AND CONVINCING EVIDENCE THAT THE DEFENDANT SUBJECTIVELY INTENDED TO UTTER A DEFAMATORY FALSEHOOD.

The court of appeals in this case did nothing more than apply this Court's well-settled precedent applicable to public officials who assert defamation claims arising from criticisms about their official conduct. Such a claim, this Court has made clear, must be

> considered against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open and that it may include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

New York Times, 376 U.S. at 267-70. In light of this Constitutional commitment, this Court has held that where a journalist's report regarding a matter of public concern

> reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth.

Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990).

There is a "paramount public interest in a free flow of information to the people concerning public officials." *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964). Although constitutional principles do not give to any journalist the right knowingly to publish false statements of fact about a judge or any other public official, the dangers that arise when a public official sues the press for publishing criticisms *of his official conduct* cannot be lightly dismissed. As this Court has observed:

> [T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.

Mills v. State of Alabama, 384 U.S. 214, 218 (1966).

These principles are not muted when the plaintiff is an elected trial court judge. To the contrary, as this Court has repeatedly held, "[t]he operations of the courts and the judicial conduct of judges are matters of utmost public concern." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978). *See also Bridges v. State of California*, 314 U.S. 252, 270-271 (1941) ("The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion . . . [A]n enforced silence . . . in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect."); *id.* at 289 (Frankfurter, J., dissenting in part) ("Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions.").

In *New York Times*, this Court held that a public official cannot recover damages for a defamatory falsehood unless he or she proves, with "convincing clarity," that the false statement was made knowingly and with "actual malice." 376 U.S. at 285-86. The actual malice test is a subjective one, and can be met only by evidence that the defendant "realized that his statement was false or that he subjectively entertained serious doubts as to the truth of his statement." *Bose Corp.*, 466 U.S. at 511 n.30.

Since *New York Times*, this Court has confirmed repeatedly that a public official must show actual malice *whenever* he or she asserts a claim, however denominated, that arises from "speech injurious to reputation. . . ." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 511 (1991). *See generally Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988) (where a claim by a public figure for intentional infliction of emotional distress is based upon a claimed defamatory publication, the plaintiff must show both that the statement was false and that it was

made with actual malice, "*i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true"). In *Milkovich*, after reviewing the "constitutional evolution" of defamation cases since *New York Times*, this Court observed that:

> The *New York Times — Butts — Gertz* culpability requirements further ensure that debate on public issues remains "uninhibited, robust, and wide-open." *Thus, where a statement of 'opinion' on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth.*

497 U.S. at 20 (citation omitted) (emphasis supplied).

Despite this settled jurisprudence, petitioner asks this Court to hold that a defendant may be held liable for the defamatory implications of his or her speech based on an *objective* showing — that the publisher should have known the defamatory inference could arise — rather than a *subjective* showing — that the publisher in fact intended the assertedly false inference to arise.

The test proposed by petitioner has not been adopted by any circuit court. The two circuit courts to consider it, the Seventh and Ninth Circuits, have expressly rejected it. In *Woods v. Evansville Press Co., Inc.*, 791 F.2d 480 (7th Cir. 1986), for example, the plaintiff claimed that a newspaper column falsely implied that he was in financial trouble and was a religious fraud. The plaintiff contended that he should be allowed to recover regardless of whether the defendant had actually intended that the news article contain these implications. *Id.* at 487. The Seventh Circuit rejected plaintiff's proposed approach:

> In *New York Times*, . . . the Supreme Court recognized that a rule requiring a publisher to guarantee the truth of his statements would result in "self-censorship", which would have a chilling effect on public debate and the free exchange of ideas. Similarly, requiring a publisher to guarantee the truth of all the inferences a reader might reasonably draw from a publication would undermine the uninhibited, open discussion of matters of public concern. A publisher reporting on matters of general or public interest cannot be charged with the intolerable burden of guessing what inferences a jury might draw from an article and ruling out all possible false and defamatory innuendoes that could be drawn from the article.

Id. at 487-88 (citation omitted).

In *Saenz v. Playboy Enterprises, Inc.*, 841 F.2d 1309, 1317-18 (7th Cir. 1988), the Seventh Circuit reaffirmed *Woods* and held that the federal "actual malice" standard, defined through a subjective standard, must be met with "convincing clarity" in cases arising from allegedly defamatory implications. The court reasoned that the requirement of actual intent followed from the federal constitutional rules governing direct defamation claims:

> If a plaintiff official must establish by clear and convincing evidence that the defendants acted with actual knowledge of or in reckless disregard for the falsity of their accusations, it follows that where the plaintiff is claiming defamation by innuendo, he also must show with clear and convincing evidence that the defendants intended or knew of the implications that the plaintiff is attempting to draw from the allegedly defamatory material.

Id. at 1318.

The Ninth Circuit in *Newton* adopted this same approach. In that case, entertainer Wayne Newton had obtained a jury verdict in his favor in a defamation action against NBC. *Newton*, 930 F.2d at 679. The district court then denied NBC's motion for judgment notwithstanding the verdict on the ground that the NBC broadcast had defamed Newton by implying that the Mafia had obtained a hidden interest in the Aladdin Hotel in Las Vegas by helping to finance Newton's acquisition of the hotel. *Id.* The district court held that NBC "should have foreseen" the defamatory implication. On appeal, the Ninth Circuit held that the district court had erred:

> The district court's standard of what "should have been foreseen" is an objective negligence test while the actual malice test of *New York Times* is deliberately subjective. The relevant inquiry asks whether a journalist "realized that his statement was false" or whether he "subjectively entertained serious doubt as to the truth of his statement." *Bose*, 466 U.S. at 511 n. 30, 104 S. Ct. at 1965 n. 30. Negligence, weighed against an objective standard like the one used by the district court, can never give rise to liability in a public figure defamation case. "A 'reckless disregard' for the truth . . . requires more than a departure from reasonably prudent conduct." *Harte-Hanks*, 109 S. Ct. at 2696. Accordingly, the district court erred in basing liability on an objective standard.

Id. at 680.

The Ninth Circuit's decisions here and in *Newton* are fully consistent with and correctly applied this Court's well-settled First Amendment jurisprudence, including *New York Times* and its progeny. Petitioner has presented no basis upon which this

Court should adopt a different set of rules for cases of alleged defamation-by-implication. Accordingly, there is no basis for review by this Court.

II.

THE DECISIONS OF THE COURTS OF APPEALS ARE NOT IN CONFLICT ON THE ISSUE PRESENTED BY THE PETITION.

Contrary to Dodds' assertion, there is no conflict among the courts of appeals on the question presented by the petition. First, as noted above, the test applied in the Seventh Circuit is entirely consistent with the Ninth Circuit's test, for both require the plaintiff to "show with clear and convincing evidence that the defendants intended or knew of the implication that the plaintiff is attempting to draw from the allegedly defamatory material." *Saenz*, 841 F.2d at 1318.

In support of his claim that the Seventh and Ninth Circuits are in conflict, petitioner cites a passage in the Seventh Circuit's opinion in *Woods* where the court suggested in dictum that the result in that case might have been different "if the column could reasonably have only the meaning the plaintiff ascribes to it or if there was evidence that [the defendant] harbored ill-will for the plaintiff." *Id.* at 488 (discussing *Cochran v. Indianapolis Newspapers, Inc.*, 175 Ind. App. 548, 372 N.E. 2d 1211 (1978)). Even if this passing observation by the Seventh Circuit had been a reference to federal constitutional law — which it was not[6] — it does not create any conflict with the

6. *Woods* involved a private figure, not a public figure. The Indiana courts had incorporated the *New York Times* "actual malice" standard into state law, however, in cases involving private figures and issues of public concern. *See Woods*, 791 F.2d at 483. The Seventh Circuit thus decided the "actual malice" issue as a matter of state law.

Ninth Circuit's decision here. The Seventh Circuit's comment simply recognized that, as an evidentiary matter, the fact that a statement can be subject to *only one* meaning may in some circumstances undercut a defendant's assertion that he did not intend that meaning. Nothing in the court's analysis undercut its central holding that a showing of subjective intent is required in cases of defamation-by-implication just as in cases of direct defamation, and that summary judgment is proper where the evidence fails to show such subjective intent with "convincing clarity" (*id.* at 485-86) — a holding that is squarely consistent with the Ninth Circuit's decision here. *See also Saenz*, 841 F.2d at 1318 (Seventh Circuit reaffirming plaintiff's burden in "defamation by innuendo" cases of showing defendant's subjective intent by clear and convincing evidence); *Corporate Training Unlimited, Inc. v. NBC, Inc.*, 981 F. Supp. 112, 121 (E.D.N.Y. 1997) (adopting Seventh Circuit approach and entering summary judgment in innuendo case).

Dodds also posits a conflict between the Ninth Circuit's approach and that employed by the District of Columbia Circuit in *White v. Fraternal Order of Police*, 909 F.2d 512 (D.C. Cir. 1990), and by the Fourth Circuit in *Chapin v. Knight-Ridder*, 993 F.2d 1087, 1093 (4th Cir. 1993). Neither *White* nor *Chapin* conflicts with the Ninth Circuit's decision here. To the contrary, both courts resolved the defamation-by-innuendo claims before them by determining, as a matter of state law, that the defendants' statements were not reasonably capable of bearing the defamatory meanings ascribed to them by the plaintiffs. Thus, both courts resolved the cases on the basis of the first prong of the test utilized by the court of appeals below. Neither court reached the second prong of the test, at issue here, and neither court ever held that an objective showing would satisfy the federal, Constitutional "actual malice" requirement in implied defamation cases brought by public officials.

In *White*, a police officer sued the Washington Post and NBC for allegedly implying that he had used illegal drugs. The court of appeals upheld the entry of summary judgment on the ground that, as a matter of District of Columbia law, the media defendants' publications "were not capable of bearing a defamatory meaning." 909 F.2d at 514, 518-19. This threshold state law determination meant that the court did not need to, and did not, address the question whether as a federal constitutional matter the plaintiff would have needed to show, or could have shown, actual malice as well. *Id.* at 525-27.[7]

In *Chapin*, the Fourth Circuit similarly rejected as a matter of state law the plaintiff's argument that the statements at issue contained a defamatory implication, and the court therefore did not reach the federal constitutional question decided by the Ninth Circuit here. 993 F.2d at 1092-1098. Specifically, the court found that the statements about which the plaintiff complained could not under Virginia law carry with it the defamatory implications ascribed to it by plaintiff, and thus were not actionable. *Id.*

Contrary to petitioner's assertion, in neither *Chapin* nor *White* did the court of appeals decide as a federal constitutional matter that a requirement of subjective intent was "*not* part of

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7. The court did restate the common law principle that it is "immaterial *for purposes of finding defamatory meaning* whether the author or broadcaster *actually* intends or endorses the defamatory inference." *Id.* at 520 (emphasis added). That holding is fully consistent with the Ninth Circuit's approach here, where the court found that the defamatory implication identified by Dodds could reasonably have been drawn from the ABC broadcast, without considering whether ABC intended to convey that message. Pet. App. 22a. But the *White* court nowhere holds, as petitioner suggests, that liability could be imposed upon a media defendant for publishing a report regarding a public official without an *additional* showing of actual malice.

the actual malice test." Pet. 8 (emphasis Petitioner's). To the contrary, the Fourth Circuit in *Chapin* expressly noted that

> [t]he First Amendment requires that public figures prove by clear and convincing evidence that a false publication on a matter of public concern was made with "actual malice," which does not refer to ill will, but rather to *knowledge of falsity or reckless disregard of a "high degree of awareness of . . . probable falsity."*

993 F.2d at 1092, n.5 (quoting *Harte-Hanks,* 491 U.S. at 667). In *White*, the D.C. Circuit did not address *at all* the question what standard should apply for determining intent, having decided that issue solely as a matter of state law. Accordingly, as with the claimed conflict with the Seventh Circuit, discussed above, petitioner's claim of a "conflict" with the Fourth and District of Columbia Circuits is simply erroneous.

III.

PETITIONER WAIVED ANY CLAIM THAT AN OBJECTIVE TEST SHOULD BE USED TO DETERMINE ABC'S LIABILITY BY EXPLICITLY STIPULATING BELOW TO THE APPROACH ADOPTED BY THE DISTRICT COURT.

Dodds' petition should be denied for the additional reason that he waived any claim that an objective test should be used to determine liability in this case. In response to ABC's motion for summary judgment, and consistent with the local rules of the district court, petitioner filed a "Statement of Genuine Issues" with the district court to respond to ABC's statement of undisputed facts and conclusions of law.[8] In his written submission, petitioner

8. *See* Local Rules of the United States District Court, Central District of California, Rule 7.14.2. ABC's statement of undisputed facts and conclusions of law was submitted as provided in the court's Local Rule 7.14.1.

expressly listed as "undisputed" the conclusion that, in order to prevail on his claim in this case, he would have to offer "clear and convincing evidence that ABC *in fact* 'intended that the [broadcast] be read to contain the defamatory innuendoes that plaintiff attributes to it' " (emphasis in original). At no time during the proceedings before the district court did petitioner seek to withdraw this concession, and the district court expressly noted petitioner's concession of the issue in its ruling on the summary judgment motion.

The issue that Dodds has presented to this Court was raised for the first time in his opening brief to the Ninth Circuit. That court chose to reject the argument on its merits, and did not address ABC's contention that the argument had been waived.

This Court has repeatedly stated that, barring "exceptional" circumstances, it will not consider an argument that a party failed to raise in one or more of the lower courts. *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957); *Lawn v. United States*, 355 U.S. 339, 362-63 n.16 (1958). *See also Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985) (noting that a respondent should present in the opposition to a petition for writ of certiorari any claim that the petitioner waived a claim by not raising it at the trial court level).

Here, no such "exceptional" circumstances exist. The question of the burden of proof that should apply on the "actual malice" question was directly presented to petitioner, and he represented to the district court in writing that he did not dispute that it was his burden to prove that ABC intended the implication about which he was complaining. That formulation was expressly adopted by the district court, which referred to petitioner's concession on the point, and then was affirmed by the Ninth Circuit. It is this same issue that petitioner is now

seeking to contest before this Court. Because petitioner expressly waived the issue before the district court, this Court should not entertain it here.

CONCLUSION

For all the foregoing reasons, Dodds' petition should be denied.

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In The

Supreme Court of the United States

October Term, 1998

HONORABLE BRUCE W. DODDS,

Petitioner,

vs.

AMERICAN BROADCASTING COMPANY, INC., a Delaware Corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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Petitioner, the Honorable Bruce William Dodds, respectfully submits this brief in reply to Respondent American Broadcasting Companies, Inc.'s ("ABC's") brief in opposition to the Petitioner's petition for a writ of certiorari herein.

INTRODUCTION

Petitioner seeks review of the question whether the intent to convey a defamatory implication in a television news broadcast must be demonstrated under the subjective standard as applied by the Ninth Circuit, where the defamatory implication is inescapable and the result of conscious choices made by a defendant. ABC argues two new points[1] in its opposition brief: (1) that there is no reason to adopt the objective test in defamation-by-implication cases (Respondent's Brief at 11-17); and, (2) that Petitioner waived the issue in the lower court (Respondent's Brief at 20-22). As set forth below, ABC is wrong on both points.

THERE ARE VALID REASONS TO DETERMINE THE INTENT TO DEFAME UNDER AN OBJECTIVE TEST IN DEFAMATION BY IMPLICATION CASES INVOLVING PUBLIC FIGURES AND TELEVISION

The first reason to adopt the objective standard is that it is the rational approach to the growing problem of television media overreaching: it would punish, rather than reward, publishers who consciously communicate a statement "in a surreptitious and invidious manner by implication," as opposed to stating directly what they intend. *See Cochran v. Indianapolis Newspapers, Inc.*, 175 Ind. App. 548, 563, 372 N.E. 2d 1211, 1222 (Ind. App. 1978).

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1. ABC also argued that there was no conflict between the Circuits on this issue. (Respondent's Brief at 17-20.) Petitioner believes that ABC's analysis, including its attempt to distinguish *Woods v. Evansville Press Co., Inc.*, 791 F.2d 480, 488 (7th Cir. 1986), is flawed. However, Petitioner argued that there was a conflict between the Circuits in his opening brief, and, pursuant to Rule 15.6, will not readdress that issue herein.

An objective test is the reasoned approach because television defamation by implication is, at the same time, far more powerful than express defamation, and far more likely to be the result of conscious publication choices. It is more powerful because it assaults the viewer with a three-part punch of image, word, and sound, involving more of the senses than any other media. It is also a fluid, rather than static, media; the images move, the speaking tone changes, the background noise/music alters, etc. Thus, implied statements, or subliminal or indirect comments, are heightened in impact.

The defamation is most likely conscious because the media requires the selective joining of all of the sensory components of the publication, *i.e.*, visual, text, and sound. These elements are mixed and re-mixed by professionals whose aim is to make the most of each second. It is therefore virtually inconceivable that an implication is published which was not intended.

There is no reason to provide constitutional protection to undisciplined "journalism" which is not concerned about accurate reporting on matters of public interest. To the contrary, there is every reason to hold alleged journalists responsible for their conscious choices to garner audience share through titillating hints and innuendo. And an objective test, which asks whether the defamatory implication was inescapably present, would do just that without chilling the First Amendment.

Second, an objective test is not a great departure from prior precedent. Indeed, in *St. Amant v. Thompson*, 390 U.S. 727 (1968), this Court warned that the actual malice test could not be employed as subterfuge, warning that "the defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true." *Id.* at 732. Rather:

> The *finder of fact* must determine whether the publication was indeed made in good faith.

> Professions of good faith will be unlikely to prove persuasive . . . when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

Id. at 731-32 (emphasis added), citing *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 169-70 (1967).

The "inherently improbable" standard is objective, not subjective, in nature. Yet it supports a finding of subjective intent on malice. Here, Petitioner contends that a similar test, objective in nature, should support a finding of subjective intent to defame. That is, if the defamatory implication is so clear as to be undeniable, then the jury should determine the defendant's intent to defame.

THE ISSUE FOR WHICH CERTIORARI IS REQUESTED WAS PRESSED AND RULED UPON IN THE LOWER COURTS AND IS PROPERLY BEFORE THIS COURT

"Ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (explaining that the rule is not inflexible, and taking review to a certain extent due to circumstances). The rule applies to issues not "pressed or passed upon below." *Duignan v. United States*, 274 U.S. 195, 200 (1927).

Applying the above rule, however, the instant issue is properly before this Court. As even ABC acknowledges, the issue was presented to the Ninth Circuit and determined on the merits. (Respondent's Brief at 21.) Thus, this is not a case where the issue was not presented to the Court of Appeals [*see, e.g., Lawn v. United States*, 355 U.S. 339, 362 n.16 (1958) (issue was not presented to

Court of Appeals or raised in petition for certiorari)], or where the Court of Appeals determined that the issue had been waived on appeal. *See, e.g., State of Cal. v. Taylor*, 353 U.S. 553, 556 n.2 (1957). To the contrary, the instant issue was squarely before the appellate court.

ABC is also in error when it contends that Petitioner waived the issue in the trial court. It is true that Petitioner responded, "undisputed," to a series of quotations through which ABC purported to articulate the intent standard. However, it is also apparent that the trial court understood that the issue was presented, and considered it on the merits. The trial court explained the objective/subjective arguments made in *Newton v. National Broadcasting, Co., Inc.*, 930 F.2d 662 (9th Cir. 1990), explained the rationale of the *Newton* trial court's opinion, and then expressly noted:

> The [Ninth Circuit] rejected in unequivocal terms the argument relied upon by the [*Newton*] district court and ***urged by plaintiff in this case***: . . . .

(Pet. App. 42a, emphasis added.)

The instant trial court's statement, set forth above, plainly reveals that the trial court considered the instant issue.

CONCLUSION

There are valid reasons to consider adopting the rule proposed by Petitioner for cases involving implied defamation in television broadcasts. In this case, that issue was pressed by the Petitioner below, and passed upon by both the trial court and the Court of Appeals. As a result, there is no bar to review, and the writ of certiorari should issue.

Respectfully submitted,

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